Supreme Court, U.S.
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No. 84-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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AUGUST 24, 1984

Corrected petition filed September 24, 1984

QUESTIONS PRESENTED

1. Whether a district judge has inherent authority to order that the entire record of a federal grand jury investigation be disclosed, without any prior examination by the court to a petitioner who has shown only that it is re-investigating the charges on which the objecting respondent was indicted, publicly tried, and acquitted and who seeks the materials for use in administrative proceedings that cannot be reviewed by any court?

2. Whether the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act") should be construed to facilitate the Justice Department's use of the grand jury's powers to assist the judicial councils in determining whether federal judges should be administratively sanctioned or impeached for their conduct in office?

3. Whether a construction of the Act that permits a special committee to examine the records of a grand jury investigation for the sole purpose of enabling the Judiciary to determine and advise the House of Representatives whether it believes a federal judge should be impeached and reprosecuted before the Senate on charges that he committed a high crime for which he has already been publicly tried and acquitted is consistent with the Constitution's allocation of powers among the three branches of government, the Act's express provisions, or the purposes for which those provisions were adopted?*

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*Judge Hastings has filed a separate action challenging the constitutionality of the Act and of the manner in which it is being applied in the administrative proceedings against him. Hastings v. Judicial Conference of the United States, et al, No. 83-3850 (D.D.C. July 25, 1984), (appeal noted, August 23, 1984). The issues raised by that challenge will be presented to this Court in due course.

4. Whether the court of appeals erred in holding that, under the Act, a district court is a forum in which a petitioning special committee may properly seek access to grand jury materials, but is not a forum in which a respondent federal judge may present evidence in opposition to the petition and require that the judicial power be exercised independently and impartially to determine whether disclosure is necessary or proper?

PARTIES TO THE PROCEEDINGS

The members of the respondent Investigating Committee of the Judicial Council of the Eleventh Circuit are Chief Judge John C. Godbold, Circuit Judges Gerald B. Tjoflat and Frank M. Johnson, Jr., and District Judges Sam C. Pointer and William

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*(Continued)
In the courts below Judge Hastings urged only that the Committee's petition should be denied in order to minimize or avoid certain of the constitutional problems that the Act presented.

C. O'Kelley. William Borders, Jr., was identified as an interested party in the courts below, but he did not respond or otherwise appear in either court.

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No. 84-302

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE HONORABLE ALCEE L. HASTINGS,
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v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

United States District Judge Alcee L. Hastings petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit tc review the decision of that court in In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003.

OPINIONS BELOW

The district court's memorandum opinion and order are reported, In re Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), and are reproduced in the separate appendix filed with this petition, App. 59-105. The court of appeals's original decision is reported in the temporary edition of the Federal Reporter, In re Petition to Inspect and Copy Grand Jury Materials (Hastings), 735 F.2d (No. 2) 1261 (11th Cir. 1984), and is reproduced in the separate appendix, App. 1-58. The court amended its opinion in an order denying a petition for rehearing, App. 106-07. The amended opinion is not yet reported.

JURISDICTIONAL STATEMENT

The petition asks this Court to review a decision that the United States

Court of Appeals for the Eleventh Circuit entered on June 20, 1984. On August 3, 1984, that court entered an order denying Judge Hastings's petition for rehearing (App. 106-107), and on August 13, it entered a further order staying its mandate until August 27, 1984, to permit the filing of this petition. This petition was filed on August 25, 1984. The court of appeals had jurisdiction under 28 U.S.C. § 1291 (1982). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTE AND RULE INVOLVED

This case involves the provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604 (1982), and of Rule 6(e) of the Federal Rules of Criminal Procedure.

Because of their length, they have been reproduced in the separate appendix, App. 117-146.

STATEMENT OF THE CASE

1. The Nature of the Action

Petitioner is a United States district judge. His conduct was investigated by a federal grand jury. The grand jury returned an indictment charging that petitioner had conspired to corrupt and obstruct justice. Petitioner was tried and acquitted. Shortly thereafter, two members of the judicial council of the circuit in which petitioner serves filed a complaint under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604 (1982). The complaint realleged the charges on which petitioner had been acquitted and

asked the judicial council to re-investigate the charges and recommend that petitioner be impeached by the House of Representatives.

The respondent committee was appointed to investigate the allegations in the complaint. As one of the first steps in its investigation, the committee filed a petition asking the district court to permit the committee's representatives to inspect and copy all records of the grand jury that had indicted petitioner. The Justice Department supported the petition; petitioner here opposed it. The other judges serving in petitioner's district disqualified themselves, and a judge from outside the circuit was designated to preside.

The district court concluded that the Act overrode the requirements of Rule 6(e) of the Federal Rules of Criminal Procedure

and the standards that this Court had articulated to restrict the disclosure of grand jury materials. The designated judge determined that it would be inappropriate for the court to examine the materials to determine which were relevant to the committee's investigation or to resolve the factual issues raised by Judge Hastings's affirmative defenses. The court ruled that such an exercise of the judicial power by the court might "usurp the investigatory function Congress has placed within the exclusive province of the Special Committee." App. 87-89; cf. 49 n.9. The district court entered an order granting the committee's representatives full access. After hearing the appeal, a panel of specially designated judges affirmed the district court's order.

2. Statement of Facts

Attorneys from the Public Integrity Section of the Justice Department's Criminal Division used Grand Jury 81-1 in the Southern District of Florida to investigate Judge Hastings's conduct. On December 29, 1981, the Grand Jury returned and the attorneys for the government filed an indictment formally charging that Judge Hastings and William Borders, Jr., had conspired to corrupt and obstruct justice. The prosecuting attorneys represented to the trial court that the charges against Judge Hastings related solely to his official acts in United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981).

The government presented the evidence relevant to the charges against Judge Hastings in two separate trials. Mr. Borders was tried first. Judge Hastings

was not present or represented at that trial. Neither he nor Mr. Borders testified. Mr. Borders was convicted, and the court of appeals affirmed that conviction, United States v. Borders, 693 F.2d 1318 (11th Cir. 1982). Judge Hastings's trial began on January 19, 1983, and lasted until February 4, 1983. Judge Hastings took the stand, testified, and was fully cross-examined. The jury found him not guilty, and he was acquitted.

On March 17, 1983, two members of the Judicial Council of the Eleventh Circuit ("the Council") filed a complaint with the Clerk of the United States Court of Appeals for the Eleventh Circuit. Relying on that court's opinion in United States v. Borders, they realleged the facts and allegations upon which Judge Hastings had

been indicted, tried, and acquitted.[1] They asked that such investigations be conducted and orders entered "as shall be necessary to vindicate the Honor of United States Judges and to discipline [Judge Hastings] for his odious behavior including . . . the making of a recommendation to the House of Representatives that [he] be impeached. . . ."[2]

On March 29, 1983, the chief judge of the Eleventh Circuit entered an order appointing himself and four other judges to a special committee (the "Committee") to investigate the facts and allegations

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1. Relying upon newspaper stories published in connection with Judge Hastings's trial, they also alleged that the manner in which Judge Hastings had conducted his defense and his own testimony at trial showed that he had violated the Code of Judicial Conduct.

2. Complaint at 8, In re Alcee L. Hastings (11th Cir. Jud. Council), reproduced as part of the record below, Appendix to Judge Hastings's Answer and Affirmative Defenses at 6-14, In re Petition to Inspect and Copy Grand Jury Materials, 576 F.Supp. 1275 (S.D. Fla. 1983).

in the complaint (cf. App. 57-58). On June 3, 1983, the Committee filed the petition that initiated the proceedings below. App. 110-16.

3. Proceedings in the Courts Below

The Committee's petition alleged that a complaint had been filed against Judge Hastings, that the Committee had been appointed to investigate the facts and allegations contained in that complaint, and that the Committee had determined that "it must examine the record, transcript, minutes and exhibits of the proceedings of the grand jury that indicted Judge Hastings and Mr. Borders." App. 111-13. The Committee acknowledged that its petition did not satisfy the requirements of Rule 6(e) of the Federal Rules of Criminal Procedure, but asked that the district court exercise inherent authority to order disclosure without any further

inquiry into the Committee's need for those materials.

Throughout, the Committee argued that the Act's provision authorizing each special committee to "conduct an investigation as extensive as it considers necessary" [Act, § 3(a); 28 U.S.C. § 372(c)(5) (1982)] coupled with an overriding need to maintain the integrity of the judicial branch required that the Committee be granted access to all available materials that might bear upon Judge Hastings's conduct in office. The Committee urged that the importance of the Act's underlying purposes supported a determination that that statutory provision overrode the limitations imposed by Rule 6(e) and justified a departure from the traditional "particularized need" standard as it had been articulated and applied by this Court.

The Justice Department urged that the Committee's petition be granted. The attorneys who had prosecuted both criminal cases advised the district court that, "as the sole party privy to the grand jury materials, the Government represents that they contain information relevant to the Committee's investigation, which the Committee does not have readily available to it."[3] They urged that blanket disclosure of grand jury materials was necessary because "criminal proceedings may not always be a viable way of dealing with alleged acts of misconduct by sitting federal judges, thus emphasizing the interest in insuring that the Investigating Committee [sic] have all available information for use in performing its functions under 28 U.S.C. § 372(c)."[4]

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3. Government Response to Petition to Inspect and Copy Grand Jury Materials at 5-6, In re Petition (S.D. Fla.), supra.

4. Id. at 6.

They amplified the Department's position before the court of appeals. They confirmed that the Department had assumed responsibility "for investigating . . . allegations of criminal misconduct by, and involving, federal judges" and reported that "[i]n a small number of cases in which an indictment has not been returned, there has been evidence developed before a grand jury that reflects possible misconduct by a sitting judge . . . [and that] is not generally known outside the Grand Jury."[5] On this basis, they urged that the Act should be construed to provide the Justice Department with a mechanism by which it "may disclose to a Judicial Council possible evidence of misconduct that was

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5. Brief for Appellee United States of America at 16-17, In re Petition to Inspect and Copy Grand Jury Materials (Hastings), 735 F.2d 1261 (11th Cir. 1984).

developed exclusively before a grand jury."[6]

Judge Hastings appeared and asked the district court to dismiss or deny the Committee's petition. He contended that the Act's express prohibitions against any public disclosure during the administrative proceedings and against any construction that would affect the Federal Rules of Criminal Procedure [Act, § 3(a); 28 U.S.C. § 372(c)(14) and (c)(16)(1982)] should be construed to prohibit judicial proceedings of the kind initiated by the petition. He argued that Congress's declared intent to preserve the exclusivity of the House's impeachment prerogatives combined with the doctrine of constitutional avoidance to preclude a construction of the Act under which agencies of the judicial branch would

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6. Id. at 17.

assume the role of legislative commissioners responsible for re-investigating charges that an acquitted judge had committed a high crime in office. Moreover, he argued that the Justice Department's position made it clear that the potential for misuse of the grand jury's powers that had recently concerned this Court was present in concrete form in this case.

In the alternative, Judge Hastings contended that he was entitled to have the court grant him the same protections granted other former targets of grand jury investigations. At a minimum, he urged that any disclosure must be limited to materials that the court independently determined were relevant to the facts and allegations of the complaint and were not available to the Committee from the trial records or other readily accessible

sources. In addition, he pled and claimed he was entitled to an opportunity to prove facts supporting two affirmative defenses. First, he alleged the petition was an act in furtherance of a constitutionally impermissible conspiracy to deprive him of rights he held incident to the judicial office and was motivated by an intent to retaliate against him for the manner in which he had conducted his defense in the criminal proceedings. Second, he alleged that the facts that had leaked to the press prior to the filing of the petition made it likely that disclosure of the grand jury materials to the Committee would result in further improper leakage and use of those materials.

After the judges of the Southern District of Florida recused themselves, the Chief Justice designated the Honorable Eugene A. Gordon of the Middle District of

North Carolina to hear and decide the case. Judge Gordon heard oral argument and considered the pleadings and legal memoranda submitted by the parties, but declined to examine the grand jury materials himself or to hear any evidence in support of or in opposition to the petition.

On December 20, 1983, Judge Gordon granted the petition (App. 99-105). In an accompanying memorandum opinion, Judge Gordon concluded that the Committee's investigation was not preliminary to a "judicial proceeding" within the meaning of Rule 6(e) (App. 73-76) and that the Committee's petition had not established a "particularized need" under the standards articulated and applied by this Court (e.g., App. 75-76). Nonetheless, he concluded that, in view of the Act's purposes, the provisions authorizing the

Committee to "conduct an investigation as extensive as it considers necessary" was sufficient to require that court exercise inherent authority and grant the petition (App. 67-68, 81-84). For the same reason, Judge Gordon concluded that it would be inappropriate for the court to interpose its own judgment by independently examining the grand jury materials to determine whether they were relevant to the allegations in the complaint (App. 84-89). Those same purposes led Judge Gordon to conclude that the Act precluded the court from considering any affirmative defenses Judge Hastings might assert (App. 89-97).

Judge Hastings promptly appealed. Upon receipt of a certificate of necessity, the Chief Justice designated three circuit judges from other circuits to hear and decide the appeal. The special panel stayed the district court's order and

established an expedited schedule for briefing and argument. The parties renewed and further developed their contentions.

The court of appeals affirmed the district court's decision and essentially adopted that court's construction of the Act and its reasoning (App. 1-56). Initially, however, that court ruled that independent examination of the materials by the district court prior to disclosure might have been required if the grand jury's investigation had not focused solely upon the specific conduct alleged in the complaint (App. 46-47). When Judge Hastings reminded the court that there had been no indication or representation that the grand jury's investigation here was so limited[7] and the Justice Department

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7. Petition for Rehearing at 2-4, In re Petition (11th Cir.), supra; see also, Reply Brief for Appellant the Honorable Alcee L. Hastings at 1-2, 6-8, id.

confirmed that it was not[8], the court amended its opinion to suggest that the burden of proving the scope of the grand jury investigation was upon the accused and that it had not been met by Judge Hastings (App. 106-07).

REASONS FOR GRANTING THE WRIT

There are three basic reasons why this Court should review the decision of the court of appeals. First, the decision below represents a dramatic departure from the decisional jurisprudence that this Court has established to protect the integrity of the grand jury as an institution and to prevent the misuse of its powers. Moreover, the court below approved an exercise of inherent power to order disclosure of the record of a grand jury investigation that was without precedent

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8. Response of Appellee United States of America to Petition for Rehearing, In re Petition (11th Cir.), supra.

even in the decisions of the inferior federal courts. This Court should review the decision to determine whether the lower court correctly determined that the provisions of the Act and the policies for which it was adopted required so substantial a departure from the well-established principles that the courts have consistently applied in considering requests that grand jury materials be made available for civil use.

Second, the court of appeals construed the Act in a manner that enhanced the constitutional problems inherent in the new statutory assignment of powers to the Judiciary. The Executive had fully exercised the powers of the grand jury to investigate a federal judge's conduct in office and had fully exercised its own discretionary powers to present evidence before the courts to show that that judge

had committed a high crime in office. The indictment alleged conduct that, if proved, could only constitute an impeachable offense, and the evidence that that offense had been committed was developed and made part of the public record. Those records are available to the House of Representatives, and that body is fully competent to conduct any further investigations it deems necessary to determine whether impeachment proceedings are appropriate.

The court of appeals construed the Act to require that a special committee of judges be permitted to examine the records of the grand jury's investigation in an effort to develop a more comprehensive record so that a judicial council and the Judicial Conference could determine whether the impeachable offense alleged had been committed and, if so, could

certify that determination and the record upon which it was based to the House of Representatives for its review. The effect of that decision is to maximize the role of the Judiciary in conducting impeachment investigations and to increase the Executive's incentives to use its powers and those of the grand jury to enhance this judicial role. This Court should grant review to determine whether Congress intended, the Act requires, or the Constitution permits such an expansive interpretation of the Judiciary's newly prescribed administrative powers.

Finally, the interests of the lower courts and their proper functioning can best be served by a prompt and definitive resolution of the questions presented by this court. All concede that the Act represents a substantial political innovation whose implementation will signifi-

cantly affect all judges serving on the inferior federal courts. This Court should grant review to remove the uncertainty created and to provide guidance to the judges of those courts so that the Act may be impartially and uniformly implemented.

The nature of the interests affected by the Act enhances the need for review in this Court. The Justices of this Court are the only Article III judges who are not subject to the Act and, apart from the Chief Justice, the only judges whose powers can be neither enhanced nor diminished by the manner in which the Act is implemented. In the courts below, petitioner conceded that the rule of necessity required that the presiding judges decide the issues presented, notwithstanding the fact that their own interests would be affected by their

decisions. This Court should grant review to assure that those issues are, and are seen to have been, impartially resolved in a manner that properly weighs the interests of federal judges subject to proceedings under the Act as well as the interests of those federal judges whose powers were enhanced by the Act. Each of these reasons is developed briefly below.

1. The Court Should Grant Review to Determine Whether the Lower Court's Unprecedented Departure from Established Principles Developed to Protect the Integrity of the Grand Jury Was Justified.

a. The decision of the court of appeals conflicts with specific principles articulated and applied by this Court in each of the five cases in which this Court has considered requests that grand jury materials be disclosed for use in civil proceedings. United States v. Proctor & Gamble, 356 U.S. 677 (1958) (civil anti-trust defendant not entitled to disclosure

of grand jury transcripts being used by government as civil plaintiff absent a further showing of specific need); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) (district judge may not grant civil antitrust plaintiff disclosure of specific transcripts that government had previously disclosed to civil defendants without examining the proceedings for which disclosure was requested and the precise grand jury materials requested to determine whether petitioner had established a specific need for particular materials that outweighed the interests embodied in the Rule of Secrecy); Illinois v. Abbott & Associates, Inc., 103 S.Ct. 1356 (1983) [statutory command that Attorney General disclose evidence gathered in criminal antitrust investigations to state attorney generals prosecuting civil antitrust claims insufficient to

override the Rule of Secrecy as codified in Rule 6(e) of the Federal Rules of Criminal Procedure]; United States v. Sells Engineering, Inc., 103 S.Ct. 3133 (1983) [public interest in enforcement of False Claims Act insufficient to support construction that attorneys in Justice Department's Civil Division are "attorneys for government" within the meaning of Rule 6(e)(3)(A)(i) in order to permit disclosure of grand jury materials without demonstration of particularized need]; and United States v. Baggot, 103 U.S. 3164 (1983) [enforcement of revenue laws insufficient to justify construction that administrative proceedings that permit but do not require determination by courts are proceedings preliminary to a "judicial proceeding" within the meaning of Rule 6(e)(3)(C)(i)].

In each of those cases, criminal

proceedings had been terminated without a trial. In each of those cases, all parties conceded the apparent relevancy and usefulness of the grand jury materials sought. In each of those cases, all parties conceded that disclosure of the materials sought would substantially reduce the burdens and costs of investigation and discovery and the possibility that injustice might result if disclosure were not allowed. In each of those cases, the parties seeking disclosure intended to use the material to vindicate major public interests and policies that Congress had explicitly recognized and codified in federal statutes. In each of those cases, this Court found that the party seeking disclosure had not satisfied the particularized need test or met the "judicial proceedings" requirement and thus was not entitled to disclosure.

The court of appeals concluded that the policies it found in the Act required that it reject both the approach taken and the principles applied by this Court in those decisions. Those policies so outweighed the interests embodied in the Rule of Secrecy that the court below found it necessary to reject the principles of statutory construction applied by this Court in Abbott and Sells and to adopt a broad construction of the Committee's statutory mandate in order to find a basis justifying disclosure. The court below also found that the nature of the proceedings authorized by the Act and the interests served required that it approve an exercise of inherent authority to avoid the "judicial proceeding" requirement imposed by Rule 6(e)(3)(C)(i), notwithstanding the approach this Court had taken in Baggott. The court of appeals thought

those same considerations required that the "particularized need" test reiterated in Douglas be reduced to a "reasonable nexus" test and required that the district court abstain from any independent exercise of the judicial power to resolve the parties' contending claims lest it usurp the administrative function the Act assigned to the Committee and the Council. The Court should grant review to determine whether the district courts have an inherent authority as flexible and broad as that affirmed by the court of appeals and, if so, whether it was properly exercised in this case.

b. The decision of the court of appeals also conflicts with the policies this Court's decisions were intended to promote. The grand jury is a unique institution. It straddles two branches of government and serves functions unique to

each. As a judicial institution, the grand jury serves to protect the individual from an overzealous prosecutor (or occasionally to protect society from a prosecutor not zealous enough). As an investigative institution, it significantly enhances the powers of the Executive to investigate possible violations of the criminal laws.

The unique nature of the institution and the potential that its powers might be abused have traditionally guided the courts in exercising the judicial power. The Rule of Secrecy was developed and has been consistently applied by this Court to protect the integrity of the grand jury as an institution and to eliminate incentives that might encourage the Executive to misuse its powers. The respondents here argued in the courts below that these policies were inapplicable when the governmental actors involved were prose-

cuting attorneys and investigating judges. Instead, they argued that the correct policy required that the courts encourage the Justice Department to use the powers of the grand jury to investigate federal judges and thereby to facilitate the work of the judicial councils and their special committees.

The decision below makes this new policy a reality. The court of appeals adopted a holding that encourages prosecuting attorneys to investigate federal judges by making them secure in the knowledge that even if no criminal conduct is revealed the products of the investigation may be transmitted to the investigated judge's circuit council. Moreover, that decision effectively eliminates the one institutional barrier that exists to prevent misuse of the grand jury -- the district court. The object of

a grand jury investigation has traditionally had standing to object to disclosure and to challenge any misuse of the grand jury's records to assure that a case and controversy is presented that will enable the district court to exercise the judicial power to assure that the contending claims are independently evaluated and properly resolved. Where the object of the investigation is a federal judge, the court of appeals concluded the courts must abdicate that role. This Court should grant review to determine whether that decision is correct.

2. The Court Should Grant Review to Determine Whether the Court of Appeals Properly Construed the Act to Avoid or Minimize the Conflict Between the Statutorily and Constitutionally Prescribed Allocation of Powers.

Congress recognized that delegation of power to investigate or sanction federal judges would raise substantial

constitutional questions. See, e.g., H.R. Rep. No. 1313, 96th Cong., 2d Sess. 17-19 (1980); S.Rep. No. 362, 96th Cong., 2d Sess. 4-6, reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4318-20. Congress also determined that delegation of the House's impeachment prerogatives and the Senate's removal powers would be inappropriate as a matter of constitutional policy. See, e.g., id. Congress reasserted the exclusivity of its jurisdiction to address judicial conduct that might constitute an impeachable offense. See, e.g., id. and Act, § 3(a), 28 U.S.C. § 372(c)(6)(B)(vii), (7)(B), (8), and (14). The construction that the courts below adopted was inconsistent with the construction Congress gave its own powers and created and enhanced the constitutional questions that Congress sought to minimize or avoid.

For example, the complaint repeats the facts and allegations set forth in the indictment on which Judge Hastings was prosecuted, tried, and acquitted. Those are the only allegations with respect to which the grand jury records might reasonably be assumed to contain some relevant evidence. Those facts and allegations charge that Judge Hastings engaged in conduct that is clearly defined as a high crime by statute and that, if proven, could only "constitute . . . grounds for impeachment under Article I of the Constitution" [Act, § 3(a) § 372(c)(7)(B)]. Both the allegations and the evidence that the Executive thought properly supported them are available to Congress and the public.

By claiming it has the power to investigate the allegations further and is entitled to the products of the grand

jury's investigation, the Committee was asking the courts below to construe the Act as an assignment to the Judiciary of investigative powers held by the House incident to its sole power of impeachment and as an invitation to the Judiciary to render advisory opinions to the House on the question whether an impeachable offense had occurred. In effect, the Committee urged and the courts below found that Congress had designated the judicial councils and their ad hoc special committee's investigative agents for the House or had invited them to become congressional lobbyists for or against the impeachment of their judicial colleagues.

The construction the courts below adopted increased the probability that the Act will result in activity that impairs the ability of the courts to perform their own constitutionally assigned functions.

These proceedings alone have caused substantial disruptions to the business of the courts. Judge Hastings has been distracted from and impeded in performing his judicial duties. The judges of the district court determined en banc that they were all disqualified and recused themselves. The Council is composed of the chief judge and every other judge of the court of appeals for the circuit. A special committee of that council became involved in litigation with one district judge of the circuit before a district court within the circuit. Predictably the appeal below resulted in the disqualification of all the judges of the court of appeals and created the need to again call upon judges from outside the circuit.

In that context, the construction of the Act adopted below enhanced the serious constitutional questions that

surround the Act. Congress may not assign its investigative Article I powers to Article III judges [see, e.g., United States v. Ferreira, 54 U.S. (13 How.) 39, esp. 52-53 (1851); Hayburn's Case, 2 U.S. (2 Dal.) 408 (1792); Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948)], especially where the assignment of such powers by one branch to another is likely to unduly disrupt the ability of the receiving branch to exercise its own constitutionally assigned powers [see, e.g., Nixon v. Administrator of General Services, 433 U.S. 425 (1977)]. See also, Kaufman, The Essence of Judicial Independence, 80 Colum. L. Rev. 671 (1980) (for an alternative analysis concluding the Act is unconstitutional); see also Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50, 57-60, 59 n.10, (plurality opinion)

(discussing the conditions necessary to judicial independence and noting the need to insulate the individual judge from improper influences from judicial colleagues in order to promote judicial individualism).[9]

This Court should grant review to determine whether the decision below correctly recognized these constitutional concerns and adopted a construction that minimized or avoided them insofar as the Act permitted.[10]

---

9. Counsel does not suggest that these questions are presented for decision by this petition. Counsel raises them here, as he did below, only to illustrate the constitutional problems that were created by the manner in which the courts below construed the Act.

10. If review is granted here, counsel for petitioner will seek to present the issues raised in Hastings v. Judicial Conference, supra, to this Court as soon as feasible so that the Court might have the opportunity to consider both cases together.

3. The Court Should Grant Review to Assure that the Issues Presented are Resolved Uniformly and by the Only Court Whose Members' Interests Will Not Be Directly Affected by the Outcome.

Impartiality and independence are two conditions necessary to the constitutional exercise of the judicial power. That no judge shall preside in any case in which he or she has interests that may be affected by the outcome has long been recognized as a minimum requirement necessary to assure that the public retains its confidence in the impartiality of the courts. This Court has clearly ruled that in a controversy in which Article III judges assert rights incident to the judicial office, the entire federal Judiciary is, as a matter of law, deprived of the impartiality required for the proper exercise of the judicial power, unless the doctrine of necessity applies. United States v. Will, 449 U.S. 200,

210-17 (1980) (action brought by federal judges to determine whether Compensation Clause overrode executive and legislative action denying all governmental officials automatic raises specified in statute); see also DuPlantier v. United States, 606 F.2d 654, 662-63 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981) (action by judges challenging constitutionality of financial disclosure requirements as applied to federal judges), and Atkins v. United States, 556 F.2d 1028, 1035-40 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978) (action by judges challenging failure of Congress to adjust judicial salaries to account for inflation).

The manner in which the Act is construed and implemented must necessarily affect the interests of every district and circuit judge. For some, it may present a threat; for others, it may create enhanced

powers. But for each, it will have an effect upon the rights he or she holds incident to the judicial office. The proceedings required the courts below to determine whether and under what circumstances a special committee investigating a federal judge may have access to the records of a grand jury. The district judge who decided that question was required to decide how the Act would apply to himself as well as to Judge Hastings. More importantly, the judges of the panel that heard the appeal were required to decide in a judicial capacity what administrative powers they held as members of a circuit judicial council.

Although the doctrine of necessity compelled those courts to hear and determine the case in the first instance, the fact that those decisions were made by judges whose own interests were at stake

and who were specially chosen for the task enhances the need for review by this Court. Judges, like other citizens, are entitled to have their contending claims adjudicated to the extent possible in forums presided over by judges who do not hold otherwise disqualifying interests. This Court provides the only forum in which that is possible.

The fact that the Act affects the interests of federal judges across the country further enhances the need for review by this Court. All judges should share a common concern that the competing interests created by the Act are correctly weighed and fairly resolved. Neither the holders nor the objects of the powers assigned by the Act should be left in doubt as to their scope and proper application in proceedings such as these. This Court should grant review to assure the

balance as fairly, finally, and uniformly struck.

CONCLUSION

The Act is a new political invention. Whether its utility justifies the broad construction adopted by the courts below presents fairly debatable questions that are of great importance to all members of the federal Judiciary. Moreover, the questions also concern a unique institution, the grand jury, and present an important issue that this Court has yet to address -- the extent to which district courts retain inherent authority to order disclosure of grand jury material that is not authorized by Rule 6(e).

The questions presented are important; the decision below squarely presents them. Petitioner respectfully submits that this Court should grant the petition

and issue the writ so that they may be considered and resolved.

Respectfully submitted,

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84-302 (2)

No. 84-

Office-Supreme Court, U.S.
FILED
AUG 25 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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AUGUST 24, 1984

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A. Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5003

IN RE PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

THE HONORABLE ALCEE L. HASTINGS,
Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 20, 1984)

Before CAMPBELL*, Chief Judge, PELL** and KEARSE***, Circuit Judges.

CAMPBELL, Chief Judge:

*Honorable Levine H. Campbell, Chief Judge for the U.S. Court of Appeals for the First Circuit, sitting by designation.

**Honorable Wilbur F. Pell, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

***Honorable Amalya Lyle Kearse, U.S. Circuit Judge for the Second Circuit, sitting by designation.

This is an appeal by Judge Alcee Hastings, a district judge for the United States District Court for the Southern District of Florida, from an order of the District Court for the Southern District of Florida (Gordon, J., sitting by designation). The order allows the Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee"), to inspect the records of a federal grand jury proceeding which had returned a criminal indictment against Judge Hastings leading to his trial and acquittal.

The indictment had charged Judge Hastings with soliciting a bribe in exchange for a judicial decision. The indictment had also charged one William Borders, Jr., with offering the bribe. Each accused was separately tried. Borders was convicted, and his conviction was affirmed on appeal. United States v.

Borders, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 103 S.Ct. 1875 (1983). Judge Hastings was then tried; he was acquitted. Less than two months later, two of three district judges belonging to the Judicial Council of the Eleventh Circuit (the "Council") filed a complaint with the Council against Judge Hastings asking that he be disciplined pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, § 3(a) (the "Act"). 28 U.S.C. § 372(c). Citing to the same matters for which Judge Hastings had been tried and acquitted, the complaint charged that his conduct, including this trial testimony, demonstrated that he had violated the Code of Judicial Conduct. Complainants asked the Council to make such orders as were necessary "to vindicate the Honor of United States Judges and discipline [Judge

Hastings] for his odious behavior," including recommending to the House of Representatives that he be impeached.

Chief Judge Godbold of the Eleventh Circuit appointed himself and four other judges (including the circuit judge who had written the court's opinion in Borders's unsuccessful appeal) to a special committee to investigate the complaint as provided for in section 372(c)(4) of the Act.[1]

---

1. Paragraphs (3), (4) and (5) of subsection 372(c) govern the initial handling of complaints:

> (3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may--
>
> (A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1)of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

The Committee then filed a petition with the District Court for the Southern

---

(cont.)

> (B) concluded the proceedings if he finds that appropriate corrective action has been taken.
>
> The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.
>
> (4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--
>
> (A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;
>
> (B) certify the complaint and any other documents pertaining thereto to each member of such committee; and
>
> (C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

District of Florida seeking access to the records of the grand jury that had indicted Judges Hastings. In its petition the Committee alleged that,

> As part of its investigation of the facts and allegations of the complaint filed against Judge Hastings, the Committee has determined that it must examine the record, transcript, minutes and exhibits of the proceedings of the grand jury that indicted Judge Hastings and Mr. Borders.
> . . .
> The Committee is required by statute to conduct and maintain

---

(cont.)

> (5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

its proceedings, in confidence. 28 U.S.C. § 372(c)(14).[2]

The Justice Department's Public Integrity Section responded in support of the Committee's petition. Judge Hastings filed an answer and affirmative defenses

---

2. Section 372(c)(14) provides:

> (14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceedings unless--
>
> > (A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or
> >
> > (B) authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

in opposition to the petition, as well as a cross-petition for public disclosure of the grand jury records. A newspaper, The Miami Herald, also petitioned for public release of the records.

At a hearing on the petition, Judge Hastings vigorously opposed any disclosure. He contended that the Committee's petition was in furtherance of a conspiracy to deprive him of his constitutional rights and that it was motivated by a desire to retaliate against him for having exercised his constitutional rights at his criminal trial. He asserted that once acquitted he should not be subjected to a judicial investigation which can only undermine his Article III independence. Further, Judge Hastings argued that the Committee's petition was unlawful under the Act and that the disclosure of the grand jury records was not permitted by

Fed. R. Crim. P. 6(e), governing grand jury secrecy.

The district court issued a memorandum opinion rejecting Judge Hastings's arguments and stating that it would grant the Committee access to the grand jury materials but would deny public disclosure. In re Petition to Inspect Grand Jury Materials, 576 F. Supp. 1275 (D. Fla. 1983). The court asserted that Rule 6(e) did not provide the exclusive basis for releasing grand jury materials. Rather, the court was of the opinion that it could order disclosure under its inherent power as supervisor of the grand jury if, in the interest of justice, the Committee's need outweighed the important and long-established policy of grand jury secrecy. See Douglas Oil Co. v. Petro Stops Northwest, 441 U.S. 211, 218-19 (1979); United States v. Procter & Gamble Co., 356 U.S. 677,

681-82 (1958). The district court struck the balance in favor of disclosure:

> [I]t is this Court's duty to balance the need for effective administration of the Congressionally established procedure for judicial self-discipline against the traditional factors favoring the "'indispensable secrecy of [the] grand jury proceedings.'" [Citations omitted.] A careful evaluation of these competing concerns leads this Court to the inescapable conclusion that the minimal trespass upon the traditional values associated with grand jury confidentiality is significantly outweighed by the need of the Special Committee to examine the grand jury material and expeditiously execute its Congressional duty, thereby furthering the broad purposes of the Act.

576 F. Supp. at 1281.

Recognizing the need to minimize the breach of secrecy, the district court, in its accompanying order, imposed restrictions as to the time and conditions of access. It provided that,

1) access is permitted for a period of ninety days;

2) the records are to be kept in the office of the United States Attorney for the Southern District of Florida;

3) only the five members of the Committee, their counsel, and one secretarial assistant are permitted to view the records;

4) no reproduction is permitted except for single copies of records necessary to supplement the Committee's report, which must be kept under seal except before the Judicial Council;

5) the members of the Committee, their counsel, and the secretarial assistant are ordered to keep all information obtained from the records in strict confidence.

Judge Hastings appealed from allowance of the Committee's petition, though not from the denial of his cross-petition for public disclosure. The Miami Herald

filed a notice of appeal which has since been voluntarily dismissed. We have stayed the district court's disclosure order pending resolution of this appeal.[3]

I. THE COMMITTEE'S STANDING TO PETITION FOR GRAND JURY MATERIALS

Judge Hastings contends that the Committee was without standing under Article III to bring a proceeding in the district court seeking access to grand jury materials. He argues that absent more explicit congressional authorization the Committee, as an entity of the United States, cannot initiate this petition. United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979); United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977).

---

3. Because all the regular judges of the Court of Appeals for the Eleventh Circuit have recused themselves, the Chief Justice of the United States has designated the judges comprising the present panel to sit on this appeal.

We do not agree. Assuming the standing doctrine enunciated in Mattson and Solomon applies to the Committee's petition, we nonetheless hold that the Committee's statutory duty to "conduct an investigation as extensive as it considers necessary," 28 U.S.C. § 372(c)(5), provides the necessary congressional grant of standing to petition for grand jury records. As the district court said:

> A contrary construction of the Act would be wholly inconsistent with its broad purpose -- to preserve the integrity of the judiciary, to maintain public confidence in the judicial process, to protect the wrongfully accused, and to strengthen judicial independence. The goals are better served by a careful evaluation of the need asserted in the petition, rather than denying the authority of the Committee to initiate the petition in the first instance.

576 F. Supp. at 1279 (footnote omitted).

Further evidence that Congress intended the Committee to have standing to

petition for records of this type can be found in its conferral of "full subpoena powers" upon the Committee, 28 U.S.C. § 372(c)(9)(A). A subpoena would have been issued by the clerk of the court of appeals, 28 U.S.C. § 332(d)(1), and been subject to enforcement through the contempt power of the court of appeals. See Fed. R. Civ. P. 45(f). Had the Committee subpoenaed the records, however, it would have thrust the court of appeals into the novel role of supervising disclosure of grand jury materials. The Committee instead sought the records through the traditional path of petitioning the district court. This choice was prudent since it permitted the district court to exercise its customary control over grand jury materials. We see no point in erecting barriers to discourage the Committee from following a judicially

sound alternative to its statutory subpoena power. At the same time, Congress's express grant of subpoena power is an indication that Congress meant the Committee to have wide-ranging power of its own to secure necessary materials, and that a petition of this nature is not, therefore, outside the ambit of its intended powers.

Judge Hastings further contends that, even if the Committee has standing, only the Attorney General may bring a petition for access to grand jury materials. He cites 20 U.S.C. § 516 which provides,

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

We do not believe that section 516 bars the Committee from acting in its own behalf in petitioning for access to the

grand jury records. An investigating committee under paragraph (4) of section 372(c) is an arm of the judicial branch, not an executive agency. While it may doubtless enlist the aid of the Attorney General on appropriate occasions it was not bound to do so here. Congress certainly never intended a judicial investigating committee to be beholden to the Attorney General for permission to seek the information it needs. Cf. Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973) ("this section [28 U.S.C. § 516] does not require a congressional litigant to be represented by the Justice Department"). The independence of the Committee is indicated both in its mandate to "conduct an investigation as extensive as it considers necessary," 28 U.S.C. § 372(c)(5), and in its investiture with

"full subpoena powers," permitting it to have sought the materials directly, 28 U.S.C. § 372(c)(9)(A). In the present context, we see little difference between a petition and a subpoena. The Committee was entitled to litigate on its own, without reference to section 516.

Judge Hastings also argues that because this case involves important Article II concerns, all Article III judges, wherever located, have a "substantial interest" in the case and therefore must disqualify themselves under 28 U.S.C. § 455. The Supreme Court rejected such a construction of section 455 in United States v. Will, 449 U.S. 200 (1980), a case involving the compensation clause, which guarantees the inviolability of federal judges' salaries. Under the Rule of Necessity an interested judge may sit if the alternative would be to deny litigants a forum.

> As this Court has observed elsewhere, the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary. . . . The public might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the question presented. On balance the public interest would not be served by requiring disqualification under § 455.

449 U.S. at 217. The same reasoning applies to the present case involving an investigation under a statute designed to safeguard the integrity of the federal judiciary. We therefore decline to disqualify ourselves under section 455.

II. THE DISTRICT COURT'S AUTHORITY TO ALLOW THE COMMITTEE ACCESS TO GRAND JURY RECORDS

The main issue presented is whether the district court had authority to set aside the usual secrecy surrounding grand jury records in favor of the Committee.

In contending that the court lacked such authority, Judge Hastings argues that Fed. R. Crim. P. 6(e) is the controlling source of law in this area, and that none of its stated exceptions to the rule of secrecy apply to the Committee. Rule 6(e) provides as follows:

> (1) **Recording of Proceedings.** . . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.
>
> (2) **General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . .
>
> (3) **Exceptions.**
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its

deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

. . .

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceedings;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

Judge Hastings contends that the only arguably relevant exception is Rule 6(e)(3)(C)(i), but that the Committee's investigation is not "preliminarily to or in connection with a judicial proceeding."

The district court aparently agreed that neither the Rule 6(e)(3)(C)(i) exception nor any other express exception to the secrecy requirement in Rule 6(e) was applicable. It rejected, however, the assumption that Fed. R. Crim. P. 6(e) "provides the exclusive framework within which [the court's] discretion is to be exercised." Rather the court held that Rule 6(e) did not preclude it "from fashioning an alternate method for disclosure under its general supervisory authority over grand jury proceedings and records." We support this analysis in the special circumstances of a judicial investigation under section 372(c). In so doing, we observe that the Committee's

posture in seeking the grand jury materials is at least closely analogous to the situation for which the explicit Rule 6(e)(3)(C)(i) exception was created. The procedures for which the grand jury materials are being garnered may not be a "judicial proceeding" in the strict sense, see infra, but they are very similar. This fact, as well as the unique character of the Committee, the scope of its investigative powers, and the importance of its mission, all bolster the district court's conclusion that it was appropriate to exercise its inherent power in this context.

A. Source of the District Court's Inherent Power

The district court's belief that it had inherent power beyond the literal wording of Rule 6(e) is amply supported. This is not to say the rule is not normally controlling. It is. But it has

been authoritatively said that the rule is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court:

> [T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959) (footnotes omitted). The Advisory Committee's note on Rule 6(e) states, "This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure . . . ." Notes of Advisory Committee on Rules, following Fed. R. Crim. P. 6. This concept, to be sure,

provides little guidance as to when a court is free to go beyond the rule; still, it is certain that a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule. "Rule 6(e) which was not intended to create new law, remains subject to the law or traditional policies that gave it birth." In re Report & Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1229 (D.D.C.), mandamus denied, 501 F.2d 714 (D.C. Cir. 1974). See also In re Biaggi, 478 F.2d 489 (2d Cir. 1973).

The history of Rule 6(e) offers an interesting picture of how courts' "inherent power" has shaped the rule. First adopted by the Supreme Court in 1944, Rule 6(e) has been repeatedly amended to incorporate subsequent developments wrought in decisions of the federal

courts. In 1971 a district court went beyond the language of Rule 6(e), which at the time permitted disclosure only to "attorneys for the government," and permitted access to grand jury records by agents of the IRS in connection with a Justice Department probe. In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971). In 1977 Rule 6(e) was amended to also allow disclosure to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The Advisory Committee cited Pflaumer and noted that "[a]lthough case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their

expertise is required." Notes of Advisory Committee on Rules, following Fed. R. Crim. P. 6.

In 1983 the rule was again amended to incorporate a development in the law by the courts:

> New subdivision (e)(3)(C)(iii) recognizes that it is permissible for the attorney for the government to make disclosure of matters occurring before one grand jury to another federal grand jury. Even absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances. See e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Garcia, 420 F.2d 309 (2d Cir. 1970).

Notes of Advisory Committee on Rules, following Fed. R. Crim. P. 6 (emphasis added). These examples from the history of Rule 6(e) indicate that the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance

with the rule's general rule of secrecy. See generally Fallen v. United States, 378 U.S. 139, 142 (1964) ("the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances").

Accordingly, we do not believe that the district court's power to permit the Committee access to the otherwise secret grand jury minutes must stand or fall upon a literal construction of the language of Rule 6(e).[4]

B. Request of Judicial Investigating Committee May Suffice for Exercise of Court's Inherent Power

The above conclusion does not, of

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4. This conclusion is in no way inconsistent with the provision in the Act that "Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect . . . the Federal Rules of Criminal Procedure. . . ." 28 U.S.C. § 372(c)(16). Our holding does not amend Rule 6(e) nor does it permit investigating committees under the Act to circumvent the court-fashioned standards applicable to Rule 6(e). See infra Part III.

course, end the matter. The next question is whether the petition of a judicial investigating committee is the kind of request which, in proper circumstances, can trigger a district court's inherent power to release grand jury minutes. Certainly, as the court below stated, courts must adhere to Rule 6(e) in "garden variety" petitions for grand jury disclosure. The rule was inteded to provide a reliable statement of the law in this area, and would be rendered meaningless if departures were freely sanctioned. We assume that courts are not empowered to act outside Rule 6(e) in other than exceptional circumstances consonant with the rule's policy and spirit. Like the district court, however, we believe the request of a judicial investigating committee may constitute such an exceptional situation.

We think it highly significant that the grand jury materials in question were sought by an investigating committee acting pursuant to express statutory authority to "conduct an investigation as extensive as it considers necessary . . . ." 28 U.S.C. § 372(c)(5) (emphasis added).[5] There is every indication that Congress meant this open-ended grant to be read just as broadly as it is written. The House Report on the Act states that "Paragraph (c)(5) provides the special

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5. As the rule of secrecy derives from "a long-standing rule of common law," Congress can apparently create statutory exceptions to the Rule 6(e) standards for disclosure. Illinois v. Abbott & Associates, Inc., 103 S.Ct. 1356, 1361 & n.11 (1983). We do not suggest here that the broad grant of power to investigating committees under section 372(c) goes so far as to indicate a congressional intent to circumvent completely the secrecy concerns of Rule 6(e). But in passing on the propriety of an exercise of inherent power, courts may take into account "a specific statutory policy favoring disclosure in particular circumstances." Id. at 4315 (Brennan, J., concurring).

committee with broad flexibility and general authority to investigate the facts and allegations contained in the complaint." H.R. Rep. No. 1313, 96th Cong., 2d Sess. 11 (1980) (emphasis added). And the unique composition of an investigating committee makes such an extensive delegation reasonable. The federal judges who compose it are sheltered by Article III, and must as an obligation of their office conduct an unbiased, objective inquiry. They are suited by experience and professional training to determine what evidence needs to be examined, and to deal discreetly with all types of evidence, including confidential materials like those here in issue.

Moreover, the question under investition -- whether an Article III judge should be recommended for impeachment by the Congress, otherwise disciplined, or

granted a clean bill of health -- is a matter of great societal importance. Given the character of an investigating committee and what is at stake -- the public confidence in the judiciary, the independence and reputation of the accused judge -- paragraph (c)(5) must in our view be read, with very few strings, as conferring authority to look into whatever is material to a determination of the truth or falsity of the charges.

Beyond this construction derived from the breadth of the statutory language, there is support in the legislative history for the specific proposition that Congress intended a judicial investigating committee to have access to grand jury minutes. Several years before section 372(c) was enacted, during the Watergate impeachment proceedings, District Judge Sirica had ruled that he possessed inher-

ent power to deliver grand jury materials to the House Committee on the Judiciary; and he had exercised that power. In re Report & Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. at 1227-30. Since Congress clearly conceived of section 372(c) as a form of alternative to impeachment, it is logical to infer that Congress intended a judicial investigating committee to enjoy access to grand jury materials on a basis similar to that provided to Congress by Judge Sirica. See S. Rep. No. 96-362, 96th Cong., 2d Sess. 4-6, reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4318-20; Judicial Tenure Act: Hearings on S. 1423 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm., 95th Cong., 1st Sess. 24-26 (1977) (Statement of Senator Nunn).

This inference finds support in the colloquy in Judicial Tenure and Discipline

-- 1979-80, Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 142-43 (1980). There Representatives Rodino and McClory referred to the Judiciary Committee's acquisition of grand jury materials during the Watergate proceedings and the need for access to confidential information if the proceedings proposed by the bill are to succeed. Thus, in the context of a question by Representative Kastenmeier as to whether information possessed by the Justice Department would be available, the colloquy included the following:

> Chairman RODINO. . . . I think that while, as Mr. McClory suggested a while ago, there has to be utmost care in keeping confidential certain data and certain records, that certainly could prejudice, and I think we have to regard that as a necessary risk. But I believe that the judiciary has to recognize that there is a need for this

> kind of extension of the line of communication, if indeed we are going to succeed in this.
>
> Mr. McCLORY. Let me just add that I think there should be disciplinary action taken against a judge who violates the confidence of material that is delivered to him in confidence.
> . . . .
>
> We have very good communication during the impeachment inquiry with the Federal judge from whom we received grand jury information which, of course, is required to be secret. We carefully observed the secrecy of those confidential communications, and I think that it was an important consideration. A violation of such confidence should, I believe, be subject to some kind of discipplinary [sic] action.

While cryptic, the colloquy is fairly susceptible to the interpretation that Congress believed the court could and should give the investigating judges access to grand jury materials.

We accordingly view an investigating committee's petition to inspect grand jury materials as being backed by a congres-

sional mandate; and we believe this mandate furnishes special justification for the district court to exercise its supervisory power upon a committee's request. See note 5, supra.

The above construction is reinforced by the fact that, in enacting section 372(c), Congress was clearly anxious to establish public confidence in the investigatory mechanism. The Senate Judiciary Committee noted,

> It is important that the American people continue to be confident in their Federal judiciary. The perception of a viable healthy judiciary is of critical importance to our system of justice. With this thought in mind, the Committee is of the view that a statutory procedure be implemented to assure the public that valid citizen complaints are being considered in a forthright and just manner. Once again, the perception of justice is of critical importance . . . .

S. Rep. No. 362, 96th Cong., 1st Sess. 7 (1979), reprinted in 1980 U.S. Code Cong.

& Ad. News. 4315, 4321. Absent a review of the record of the grand jury that actually indicted a federal judge, a committee's investigation might well not reach the degree of thoroughness necessary to ensure public confidence that justice had been done.[6] Indeed, the public would quickly question the sincerity of an investigation that did not even gain access to grand jury records under the federal courts' control. We thus infer not only from the Act's broad language but from its purpose a clear congressional intent that grand jury materials be among those available to a committee in appropriate circumstances.

---

6. In an investigation going to the character and worthiness of trust of an individual, the Committee's ability to say that it has checked out everything can be important. If an extensive examination turns up nothing or only trivia, its findings will serve to enhance the reputation of the judge. If the examination is not sufficiently extensive, there will always be lingering doubts.

A further justification for the court's invocation of its inherent power here is the close correspondence between the present situation and the express exception to grand jury secrecy allowed in Fed. R. Crim. P. 6(e)(3)(C)(i). The latter exception permits the district court to direct disclosure "preliminarily to or in connection with a judicial proceeding." (Emphasis supplied.)

To be sure, the circuit council and Judicial Conference proceedings to which an investigating committee's investigation is ancillary are not proceedings before any identifiable court, and for this reason, may not be a "judicial proceeding" within the precise language of the exception. A single circuit council includes a mixture of judges from the court of appeals and from various district courts; and the Judicial Conference of the

United States is made up of judges from many different courts. See, e.g., Henry v. United States, 432 F.2d 114, 119-20 (9th Cir. 1970) (when members of the circuit council act, "they act as a council, not a court."), cert. denied, 400 U.S. 1011 (1971). Actions by a circuit council or the Judicial Conference do not, therefore, exactly fit within Judge Learned Hand's widely quoted definition of a "judicial proceeding" -- that it "includes any proceeding determinable by a court . . . ." Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958). By the same token, impeachment proceedings before Congress, which are a possible outcome of this investigation, are not by a "court," although the Congress becomes something like a court for this purpose. Compare Kilbourne v. Thompson, 103 U.S. 168, 190 (1881).

Nonetheless, while a committee's investigation is thus perhaps not ancillary to a "judicial proceeding," in the strict sense, the judge-run proceedings with which it is connected fit within Justice Holmes's definition of a "judicial inquiry":

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.

Prentise v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). Under that definition, a state court's bar disciplinary proceeding has been characterized as a judicial inquiry. Erdmann v. Stevens, 458 F.2d 1205, 1208-09 (2d Cir.), cert. denied, 409 U.S. 889 (1972). Proceedings by a circuit council after a committee's investigation closely mirror Justice Holmes's definition. Upon receipt of a committee's report, a circuit council,

> (A) may conduct any additional investigation which it considers necessary;
> (B) shall take such action as is appropriate to assure the effective administration of the business of the courts within the circuit . . . .

28 U.S.C. § 372(c)(6). A circuit council, although not a court, is clearly charged with investigating, declaring and enforcing liabilities (short of impeachment) on the basis of past facts under the legal standard of "effective administration of the business of the courts." Furthermore, a council's proceedings must, as a minimum, satisfy the procedural mandates of the Act, which require that:

> (A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;
>
> (B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to

> present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and
>
> (C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

28 U.S.C. § 372(c)(11).

Given the judicial character of a circuit council's procedures, and the "judicial inquiry" that comprises a council's task, a council's review is little removed from the judicial proceedings encompassed within the Rule 6(e)(3)(C)(i) exception, whether or not it is a judicial proceeding in the struct legal sense. Disclosure to an investigating committee is, therefore, closely akin to a Rule 6(e)(3)(C)(i) disclosure "preliminarily to . . . a judicial proceeding."

For the above reasons, we believe that a petition by a judicial investigating committee presents one of the occasions when a district court may act outside the strict bounds of Rule 6(e), in reliance upon its historic supervisory power. Permitting such a committee to have access to grand jury materials in proper circumstances would be consistent with Congress's intent under the Act and with the policy and spirit of Rule 6(e).

III. THE DISTRICT COURT'S EXERCISE OF DISCRETION IN THE PRESENT CASE

Having concluded that the Committee was entitled to petition for the grand jury records and that the district court had power, upon a showing of proper circumstances, to grant that petition, we must still decide whether the district court properly allowed the petition on the facts of this case. For while, as indicated above, a district court may grant

access in this type of situation under its inherent power, we believe it may only do so in an appropriate factual situation and with due regard to the standards for disclosure enunciated by the Supreme Court.

The Supreme Court has emphasized "that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979). Accordingly, "[the] 'indispensable secrecy of grand jury proceedings,' United States v. Johnson, [319 U.S. 503, 513 (1943)], must not be broken except where there is a compelling necessity." United States v. Procter & Gamble, 356 U.S. 677, 682 (1958). The Supreme Court has delineated a test for deciding when disclosure is appropriate:

> It is clear from Procter & Gamble and Dennis [v. United States, 384 U.S. 855 (1966)] that disclosure is appropriate

> only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure. It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. . . . In sum, as so often is the situation in our jurisprudence, the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court. And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material. . . . Moreover, we emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion.

Douglas Oil Co, 441 U.S. at 223. Applying the Supreme Court's standards to the present case we are of the opinion that the district court did not abuse its discretion in granting disclosure to the Committee.

A. The Need for the Grand Jury Records

The district court could properly determine that the Committee's need for the grand jury records was both apparent and compelling. The Committee is charged under the Act with conducting an investigation in order to further "the effective and expeditious administration of the business of the courts . . . ." 28 U.S.C. § 372(6)(B). As already noted, the Committee's investigation is to be "as extensive as it considers necessary." Section 372(c)(5). A thorough investigation is essential not only to ensure the integrity of federal judges, but also to instill public confidence in the judiciary. See supra. The Committee must be able to represent to the Council, and the Council must be satisfied, that all available evidence of possible materiality has been sifted: for the Committee to

examine matters extensively and find nothing may be as much a part of its duty as to look at evidence whose incriminating nature is known in advance. The object of the investigation is not to prove a case against the judge but to determine whether there is or is not a case.

Here we believe the Committee established its need for access to the entire record of the grand jury that indicted Judge Hastings. The grand jury had focused solely on the alleged bribery incident for which Judge Hastings was indicted and upon which the complaint is based. Only by examining all of the record can the Committee determine the true state of the evidence for or against the charge. No content-based limitation on the requested access is feasible given the Committee's mission: the Committee is interested in both inculpatory and excul-

patory evidence that might have been revealed before the grand jury, and the committee and Council alone -- not the district court -- can properly determine what is and is not significant. To be sure, if the grand jury had investigated conduct or individuals unrelated to the alleged bribe a narrower order might have been required, but this is not such a case.[7]

This petition is quite different from that in connection with a civil suit. In the normal situation attorneys seek

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7. Judge Hastings contends that the confidentiality requirement in section 372(c)(14), see supra note 2, should be construed to prevent the Committee from even filing a petition because such a petition itself destroys confidentiality. To read the requirement this way would unduly restrict the very ability to investigate complaints. The statute requires only that "[a]ll papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential . . . ." We see no breach of confidentiality on the facts of this case.

grand jury material to build their case and thus, in the interest of grand jury secrecy, they must exhaust other means of securing the relevant information before being granted access. "[T]he court could take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure." United States v. Sells Engineering, Inc., 51 U.S.L.W. 5059, 5067 (June 28, 1983). This requirement is not appropriate in the present case because of the Committee's unique investigatory mission and the necessity that, when the investigation is over, the public be assured that it was complete. Since evidence before a grand jury is not necessarily presented at trial, the Committee's review of the entire grand jury record for relevant evidence is important to its task of

leaving no stone unturned.[8] Thus given its special responsibilities, we believe the Committee satisfied the "particularized need" standard by demonstrating a close nexus between the subject of the grand jury proceeding and the complaint under investigation. Nothing more was required on the facts of this case.[9]

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8. We note too that section 372(c)(5) requires the Committee to file its report "expeditiously." Insofar as speedy disposition of complaints against judges is desirable, we think it undesirable to require the Committee to attempt to replicate the grand jury's efforts.

9. Judge Hastings argues that the district court should have reviewed the grand jury record and released only relevant excerpts. But in this unique kind of situation, such a process would have been inappropriate. After the Committee's showing of a close nexus between the grand jury proceeding and the complaint, it would have been improper for the district court to substitute its own judgment on the relevance of particular portions of the grand jury records. We agree with the district court that, "[t]o do so would usurp the investigatory function Congress has placed within the exclusive province of the Special Committee."

B. The Secrecy Interest

Against the need for disclosure stands the competing public interest in grand jury secrecy. The Supreme Court has recognized five reasons for grand jury secrecy:

> 1) To prevent the escape of those whose indictment may be contemplated; 2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; 3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; 4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; 5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there is no probability of guilt.

United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954), quoted in Procter & Gambel, 356 U.S. at 681 n.6; see also

Douglas Oil Co., 441 U.S. at 219 n.10. In the present case the grand jury is no longer active and the trial of Borders and Judge Hastings has been completed. Thus the first three reasons are no longer of major concern. Furthermore, while Judge Hastings has an interest in avoiding disclosure of the contents of the grand jury records, his completed criminal trial removes the fear of disclosing the fact that he was under investigation, as well as the fear of unjustly standing trial. But the public interest in encouraging free and untrammeled testimony before future grand juries is still important. "Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities." Douglas Oil Co., 441 U.S. at 222 (footnote omitted).

The "reduced" interest in secrecy is further diminished in this case when

the identity of the party requesting access is considered. The Supreme Court has stated:

> The Douglas Oil standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. . . . For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public.

United States v. Sells Engineering, Inc., 51 U.S.L.W. at 5067. Here the Committee consists of federal judges, who can be expected as an obligation of their office to respect the confidentiality of grand jury records (one of their duties being to supervise grand juries). Further, the district court imposed protective conditions on the Committee's access. The location and reproduction of the records, the duration of their availability,

and the persons allowed access are all strictly limited by the district court's order.

C. Striking a Balance

When the competing concerns are balanced, we think the proper conclusion here is that the Committee's need for the records outweighs the public interest in secrecy. The Supreme Court has stated that "the district court may weigh the public interest, if any, served by disclosure to a governmental body -- along with the requisite particularized need -- in determining whether 'the need for disclosure is greater than the need for continued secrecy.'" Illinois v. Abbott & Associates, Inc., 103 S.Ct. 1356, 1362 n.15 (1983) (quoting Douglas Oil Co., 441 U.S. at 222). The district court correctly considered the important "public interest in the integrity and independence of the judiciary" in deciding to grant

disclosure. We see no grounds for concluding that the district court abused its discretion in granting the Committee restricted access to the grand jury records.

Judge Hastings's final argument is that the district court should have held an evidentiary hearing on his two "affirmative defenses": 1) that the petition is in furtherance of a conspiracy by the judges of the Eleventh Circuit to deprive Judge Hastings of his constitutional rights; and 2) that the disclosure is likely to result in leakage of the grand jury records to the public. Judge Hastings's charge that the Committee's investigation is part of a larger conspiracy is not a proper subject for consideration in this appeal. The investigation is being conducted pursuant to the Act and the district court was not the proper

forum for addressing any underlying questions of constitutional abuse. Those concerns may be raised by Judge Hastings in a challenge to the actions, if any, taken by the Judicial Council.[10]

Judge Hastings's allegation of likely leakage is based on a news release circulated by the clerk of the Eleventh Circuit announcing the filing of the complaint against Judge Hastings and the appointment of an investigating committee. (See Appendix.) Judge Hastings, however, failed to point to any substantive disclosures relative to the investigation. Indeed, Judge Hastings's opposition to the Committee's petition admitted that Chief Judge Godbold, chairman of the Committee, had refused attempts by the press to

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10. Under section 372(c)(10) a judge aggrieved by an action of the judicial council of the circuit may petition the Judicial Conference of the United States for review of that action.

obtain further disclosures of information because of the confidentiality provision of the Act. Judge Hasting's sole basis for the claim that public disclosure is likely to occur is the assertion that the news release has "generate[d] investigative activity by the press that [will] make it unlikely confidentiality [will] effectively be maintained." While we do not pass on the propriety of the news release, we see no logical connection between the announcement of the investigation and a likelihood that the grand jury records will be publicized by the Committee. On the contrary, the court-imposed limitations on access and the Committee's apparent awareness of the confidentiality requirement of section 372(c)(14) lead to the opposite inference. In any event the district court did not err in rejecting this "affirmative defense" without holding an evidentiary hearing.

We conclude therefore that the restricted access granted by the district court must be AFFIRMED.

Our stay shall be lifted upon issuance of mandate.

So ordered.

APPENDIX

UNITED STATES COURT OF APPEALS
Eleventh Circuit
Office of the Clerk

Norman E. Zoller
Clerk

Tel 404-221-6187
Fts-242-6187
56 Forsyth St. N.W.
Atlanta, Georgia 30303

NEWS RELEASE April 15, 1983

A complaint has been filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit alleging that United States District Judge Alcee L. Hastings, of the Southern District of Florida, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. This complaint was filed pursuant to 28 U.S.C. Section 372 (c) (1) and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. Section 372 (c) as promulgated by the Judicial Council of the United States Court of Appeals for the Eleventh Circuit.

In compliance with Section 372 (c) and the Rule of the Eleventh Circuit, Chief Judge John C. Godbold of the Eleventh Circuit has appointed a special committee to investigate the facts and allegations contained in the complaint and to conduct an investigation as extensive as it considers necessary. The committee is composed of Chief Judge Godbold of Montgomery, Alabama; Circuit Judge Gerald Bard Tjoflat of Jacksonville, Florida; Chief Judge Frank M. Johnson, Jr. of Montgomery, Alabama; Chief District Judge Sam C. Pointer, Jr. of Birmingham, Alabama; and District Judge William C. O'Kelley of Atlanta, Georgia.

The investigating Committee has designated and appointed John Doar, Esquire, an attorney of New York, New York, who is a member of the bar of the United States Court of Appeals for the Eleventh Circuit as investigator to aid and assist the Committee in its investigation.

B. Opinion and Order of the District Court

IN THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

IN RE PETITION TO IN-)
SPECT AND COPY GRAND) NO. 81-1-GJ (MIA)
JURY MATERIAL)

MEMORANDUM OPINION

GORDON, Senior District Judge

I.

THE ISSUE FOR DECISION

The motion before the Court raises a narrow issue: Whether a Special Investigating Committee appointed under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), ("the Act")[1] can gain access to the records and evidence before a grand jury, now discharged, that returned an

1. Pub. L. No. 96-458, § 3, 94 Stat. 2035, 2036-40 (codified at 28 U.S.C. § 372(c) (Supp. V 1981)). This portion of the Act is reprinted in the Appendix accompanying this Opinion. See also, Rules for the United States Court of Appeals for the Eleventh Circuit, Addendum Three. (Hereinafter cited as Eleventh Circuit Rules).

an indictment against an Article III Judge.

A. The Act

The Act outlines a procedure for the review and resolution of complaints alleging that a judge or magistrate "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts."[2] Under subsection (c)(3) of the Act, the Chief Judge of the Circuit is required "expeditiously" to review the complaint. In specified circumstances he may dismiss the complaint or "conclude the proceeding."[3] If the Chief Judge determines that such action is not appropriate, subsection (c)(4)(A) requires the Chief Judge to "appoint himself and equal numbers of circuit and district judges of the

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2. 28 U.S.C. § 372(c)(1) - See also Eleventh Circuit Rule 1.

3. 28 U.S.C. § 372(c)(3) - See also Eleventh Circuit Rule 3.

circuit to a special committee to investigate the facts and allegations contained in the complaint."[4] Following such investigation, the Special Committee is required to file a report with the judicial council of the circuit containing its findings and recommendations.[5] Upon receipt of this report, the council, which is authorized to conduct an additional investigation, is directed to take such action "as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to," actions specifically enumerated in the Act.[6] The remainder of the Act covers various procedural details.[7]

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4. 28 U.S.C. § 372(c)(4) - See also Eleventh Circuit Rule 4.

5. 28 U.S.C. § 372(c)(5) - See also Eleventh Circuit Rule 5(a).

6. 28 U.S.C. § 372(c)(6)-(c)(8). See also Eleventh Circuit Rules 6 and 7.

7. 28 U.S.C. § 372(c)(9)-(c)(17). See also Eleventh Circuit Rules 8-14.

B. The Complaint and the Special Committee Petition

On March 17, 1983, a verified written complaint was filed with the Clerk of the United States Court of Appeals for the Eleventh Judicial Circuit pursuant to the Act. The complaint alleged that United States District Judge Alcee L. Hastings had engaged in conduct proscribed by the Act.

On March 29, 1983, the Chief Judge of the United States Court of Appeals for the Eleventh Circuit issued an order pursuant to subsection (c)(4), appointing a Special Committee to investigate the March 17 complaint. Subsection (c)(5) of the Act requires this Committee to "conduct an investigation [of the facts and allegations contained in the complaint] as extensive as it considers necessary."[8] In the performance of this statutory duty,

8. 28 U.S.C. § 372(c)(5)

the Committee has petitioned this Court[9] for leave to examine the records, transcripts, minutes, and exhibits of the grand jury that had previously indicated Judge Hastings.[10] The petition is opposed by Judge Hastings[11] who, through counsel, has filed a motion seeking to have the petition dismissed, or in the alternative to have the grand jury material disclosed

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9. The grand jury whose records are at issue was empaneled under the supervision of this Court.

10. Judge Hastings was acquitted of these charges after trial.

11. It is clear that Judge Hastings has standing to object to disclosure. As an individual acquitted of charges brought upon a grand jury indictment, he was a continuing interest in the secrecy of the grand jury materials. Cf. Douglas Oil Co. v. Petro Stops Northwest, 441 U.S. 221, 218 n.8 (1979). See also, Illinois v. Sarbaugh, 552 F.2d 768, 772-73 (7th Cir.), cert. denied sub nom. J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977).

The other party indicated by the grand jury, though notified of these proceedings, has failed to either support or object to the petition.

to the public if the motion to dismiss is denied and disclosure to the Committee is allowed.[12]

C. Contentions

1. Opposition to the petition is first premised upon the argument that the Act prohibits the Special Committee from applying to this Court to obtain access to the grand jury materials. The Court finds no authority either in the Act or in its legislative history supporting this contention.

The Act evidences Congress' intent to create, within the existing judicial-

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12. Also before the Court is the motion of the Miami Herald Publishing Company to intervene and to allow public access to the grand jury materials. The motion shall be denied. It is clear that the Act prohibits the disclosure requested by the would-be intervenor. See § 372(c)(14).

administrative framework,[13] a procedure to deal fairly, authoritatively, and efficiently with complaints of misconduct or disability made against judges and magistrates. This system, approved in princi-

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13. Congress had previously rejected other proposals that had adopted an adversarial procedure for processing complaints of judicial misconduct or disability. See, e.g., S. 1423, 95th Cong., 1st Sess. (1977) (proposing Court on Judicial Discipline); reprinted in The Judicial Tenure Act: Hearing on S. 1423 Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. 3-18 (1977); S. 295, 96th Cong., 1st Sess. (1979) (proposing Court on Judicial Conduct and Disability), reprinted in Hearings on S. 295, S. 522, S. 678 Before the Subcommittees on Judicial Machinery and Constitution of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 127-59 (1979); S. 1873, 96th Cong., 1st Sess. (1979) (proposing Court on Judicial Conduct and Disability), reprinted in Judicial Tenure and Discipline 1979-80: Hearings Before the Subcommittee on Courts, Liberties and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 1st & 2nd Sess. 311-25 (1980).

ple by the judiciary,[14] serves to effectuate the public interest in ensuring and preserving an able, honorable, accountable, and independent judiciary. The goals of the Act were to "improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's justice system, and at the same time, to maintain the independence and autonomy of the judicial branch of government." H.R. Rep. No. 1313, 96th Cong., 2nd Sess. 1 (1980). A review of the legislative history reveals that the focal point of Congressional concern centered on the perceived need for a fair, effective, and efficient way to ensure accountability of powerful life-tenured federal judges to supplement the slow and

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14. See Report of the Proceedings of the Judicial Conference of the United States 57 (Sept. 1979); Report of the Judicial Conference of the United States 4-6 (March 1979).

cumbersome impeachment process.[15] Little guidance can be found on the narrow procedural question before this Court.[16]

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15. See, e.g., 126 Cong. Rec. S13859-60 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini); Id. at S13861-65 (statement of Sen. Mathias); Id. at H8785 (daily ed. Sept. 15, 1980) (statement of Rep. Kastenmeier); Id. at H8787 (statement of Rep. Gudger); Id. (statement of Rep. Rodino); 125 Cong. Rec. S15379-80 (daily ed. Oct. 30, 1979) (statement of Sen. DeConcini); Id. at S15385-27 (statement of Sen. Thurmond); Id. at S15393-97 (statement of Sen. Heflin); Id. at S15397-99 (statement of Sen. Bayh); Id. at S15412-14 (statement of Sen. Hatch); Id. at S 15419-21 (statement of Sen. Nunn).

16. Though subsection (c)(11) of the Act gives the judicial councils authority to "prescribe . . . rules for the conduct of proceedings" under the Act, the rules promulgated by the Judicial Council of the Eleventh Circuit generally reiterate the Act, thus offering little guidance. See Eleventh Circuit Rules, supra note 1. The rules adopted by the other circuit councils are similarly unenlightening. But see, Rules of the Judicial Council of the Third Circuit with respect to Complaints of Judicial Misconduct or Disability (hereinafter cited as Third Circuit Rules). See generally, Burbank, Procedure Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283 (1982); Neiser, The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer, 65 Judicature 143 (1981).

Nevertheless, the scant legislative history touching this area suggests that Congress did not intend to restrict the investigatory methods a Special Committee might pursue. Subsection (c)(5) of the Act imposes a duty upon the Committee to "conduct an investigation as extensive as it considers necessary."[17] Congress assigned and entrusted the duty and responsibility to committees of Federal Judges and intentionally gave them the wide latitude to investigate without limitation as they "consider [] necessary." Consistent with the desire to avoid an adversarial-disciplinary procedure, an "inquisitorial-administrative" approach was suggested and adopted for the conduct of such investigation, rather than an adversarial-trial concept. H.R. Rep. No. 1313, supra at 14. Subsection (c)(5) was therefore seen to "provide [] the

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17. 28 U.S.C. § 372(c)(5).

special committee with broad flexibility and general authority to investigate the facts and allegations contained in the complaint." Id. at 11. Thus, it is for the Committee to "control the objectives and nature of the inquiry." Id. at 14.

This Court recognizes the power and right of a Special Committee to petition for access to grand jury material. A contrary construction of the Act would be wholly inconsistent with its broad purposes--to preserve the integrity of the judiciary, to maintain public confidence in the judicial process, to protect the wrongfully accused, and to strengthen judicial independence. These goals are better served by a careful evaluation of the need asserted in the petition, rather than denying the authority of the Committee to initiate the petition in the final instance.[18]

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18. In addition, Judge Hastings asserts that the strict confidentiality provisions

2. Judge Hastings has also challenged the power of this Court to hear and decide this petition. It is concluded that this Court has jurisdiction to hear a petition seeking access, to the records of a discharged grand jury convened in its district. As a general rule, "requests for disclosure of grand jury transcripts

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18. (Cont'd.)

of the Act prohibit the initiation of this petition as well as its consideration by the Court. See 28 U.S.C. § 372(c)(14) and Eleventh Circuit Rule 12. Neither the petition nor this opinion violate the strictures of subsection (c)(14). We deal here solely with legal issues raised in briefs that were of public record. The confidentiality provisions of the Act are properly viewed as an effort to preserve the secrecy of "the facts and allegations contained in the complaint," and the facts and allegations subsequently uncovered during a Committee or Judicial Council investigation. The resolution of this matter was structured to present little risk that factual material would be improperly revealed to the public.

Nevertheless, the court is troubled by the fact that the file in this action is of public record. Henceforth, the confidentiality requirements of the Act and the Eleventh Circuit Rules should be scrupulously followed. See Eleventh Circuit Rule 13.

should be directed to the court that supervised the grand jury's activities." Douglas Oil Co. v. Petro Stops Northwest, 441 U.S. 211, 226 (1979). See also Fed. R. Crim. P. 6(e)(3)(D). Not only is this Court the only Court with authority and control over the grand jury records, but it also has the responsibility for maintaining the secrecy of the grand jury proceedings. Thus, the Committee, though an arm of the judiciary, had no choice but to petition this Court for access. Douglas Oil, supra at 225.

Subsection (c)(10) of the Act[19] does not prevent this Court from entertaining the petition. That section, properly read, prohibits only judicial review of the Special Committee's findings and recommendation. The Act does not foreclose all resort to the judicial power

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19. See 28 U.S.C. § 372(c)(10), infra. See also Eleventh Circuit Rule 8.

during the investigatory stage of a Special Committee's duty. Under subsection (c)(9)(A), the Special Committee has the authority to exercise the subpoena power. If, during its investigation, a witness should refuse to obey the command of the subpoena, the Committee certainly would have the authority to invoke the jurisdiction of the appropriate court to seek enforcement of the subpoena. In reaching a decision on enforcement, the Court does not run afoul of subsection (c)(10). In a similar fashion, the Committee can attempt to supplement its investigatory efforts by petitioning for access to grand jury material, without requiring this Court to conduct the review prohibited by subsection (c)(10).

Finally, the argument is made that under 28 U.S.C. § 455(a)[20] all Article

20. 28 U.S.C. § 455(a) provides that "Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

III judges are disqualified from hearing this petition. To hold that all Article III judges are disqualified to hear the petition would severely limit the work of the committee and is contrary to the obvious intent of Congress. The public interest in a fair and correct resolution of this crucial matter requires this Court to accept its responsibility "to say what the law is," albeit for the first time. Murbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Therefore, this Court finds that the Rule of Necessity requires that this forum be and remain open and available for a ruling on the petition. See United States v. Will, 449 U.S. 200, 217 (1980); DuPlantier v. United States, 606 F.2d 654, 662 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981); Atkins v. United States, 556 F.2d 1028, 1035-40 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

II.

RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The decision to grant access to grand jury material is committed to the "substantial discretion" of the district court. Douglas Oil, supra, at 223; see also Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959). Opposition to this petition is based upon the assumption that Fed. R. Crim. P. 6(e)(3)(C)(i) (hereinafter "the Rule" or "Rule 6(e)")[21] provides the exclusive framework within which this discretion is to be exercised. The Committee, on the other hand, contends that Rule 6(e) does not preclude this Court from fashioning an alternative method for disclosure under

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21. Fed. R. Crim. P. 6(e)(3)(C)(i) provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made -- (i) when so directed by a court preliminarily to or in connection with a judicial proceeding. . . ."

its general supervisory authority over grand jury proceedings and records.

Rule 6(e)(3)(C)(i) stands as a codification of the common law rule that the secrecy of grand jury material is to be preserved except in those rare instances where disclosure is necessary to prevent injustice. The Rule recognizes that litigants in a "judicial proceeding", see United States v. Baggot, 103 S.Ct. 3164 (1983), will occasionally have a "particularized need", see United States v. Sells Engineering, Inc., 103 S.Ct. 3133 (1983), for grand jury material to prevent an injustice in that proceeding. Thus, disclosure has been deemed proper to impeach a witness or test his credibility, see, e.g., Dennis v. United States, 384 U.S. 855, 868-75 (1966); United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958), or to refresh a witness'

recollection, see, e.g., Douglas Oil, supra at 222 n.12, In re Corrugated Container Antitrust Litigation, 687 F.2d 52 (5th Cir. 1982).

Baggot and Sells reaffirm the broad applicability of the Rule for garden-variety petitions for grand jury disclosure. The unique circumstances out of which this petition arise, coupled with the recognized need for access by the Committee to enable it to perform its statutory duty, clearly remove this petition from the "narrow area" of secrecy codified by the Rule. In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1227 (D.D.C. 1974). This Court is not persuaded that a Committee composed of Article III judges, acting as an arm of the judiciary and in furtherance of a Congressional mandate, has no authority other than that given by Rule

6(e) to review grand jury material. In similarly unique circumstances, it has been recognized that the Rule is not the sole repository of the district court's authority to grant access to grand jury records. In re Biaggi, 478 F.2d 489, 492-93 (2nd Cir. 1973); In re Report and Recommendation of June 5, 1972 Grand Jury, supra at 1227-29; In re Bullock, 103 F. Supp. 639, 641 (D.D.C. 1952); see also In re Grand Jury Investigation of Ven-Fuel, 441 F.Supp. 1299, 1304-07 (M.D. Fla. 1977). This is because "Rule 6(e) . . . was not intended to create new law, [and] remains subject to the law or traditional policies that gave it birth." In re Report and Recommendation of June 5, 1972 Grand Jury, supra at 1229. These traditional policies demonstrate that the primary concern is which course--disclosure or non-disclosure--will further the

ends of justice and the search for the truth. United States v. Socony-Vacuum, 310 U.S. 150, 233-34 (1940). The inherent power of the supervising court to disclose grand jury material will be affirmatively exercised only if the recognized need for the material outweighs the traditional considerations justifying secrecy. Therefore, it is this Court's duty to balance the need for effective administration of the Congressionally established procedure for judicial self-discipline against the traditional factors favoring the "'indispensable secrecy of [the] grand jury proceedings.'" Proctor & Gamble, supra at 681 (quoting United States v. Johnson, 319 U.S. 503, 513 (1943)). A careful evaluation of these competing concerns leads this Court to the inescapable conclusion that the minimal trespass upon the traditional values associated with grand jury

confidentiality is significantly outweighed by the need of the Special Committee to examine the grand jury material and expeditiously execute its Congressional duty, thereby furthering the broad purposes of the Act.

The traditional policies advanced for preserving the secrecy of grand jury material have been "correctly summarized" as

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of

> standing trial where there was no probability of guilt.

Douglas Oil, supra at 219 n.10 (quoting United States v. Rose, 215 F.2d 617, 628-29 (3rd Cir. 1954).

The first three reasons for secrecy are no longer applicable where, as here, the grand jury has concluded its investigation and has been discharged. United States v. Moten, 582 F.2d 654, 663 (2nd Cir. 1978); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281, 287 (8th Cir. 1978); Illinois v. Sarbaugh, 552 F.2d 768, 775 (7th Cir.), cert. denied sub nom. J. L. Simmons Co. v. Illinois, 434 U.S. 889 (1977); In re Report and Recommendation of June 5, 1972 Grand Jury, supra at 1229; see also, United States v. Socony-Vacuum, supra at 234 ("[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.").

There has been no showing that allowing the Special Committee access will impede an ongoing investigation, or otherwise affect any civil or criminal proceeding. The rationale of the fourth and fifth reasons, however, still has force in these circumstances. Preserving the secrecy of past grand jury proceedings facilitates the effective functioning of future grand juries, by reassuring future witnesses that their testimony will, as a general rule, remain confidential. Douglas Oil, supra at 222. In addition, Judge Hastings clearly falls within the class protected by the fifth reason for grand jury secrecy: He is an "innocent accused." Although the return of an indictment against Judge Hastings removed his interest in maintaining the secrecy of the existence of the grand jury investigation, his subsequent acquittal intensifies his

interest in preserving the secrecy of the grand jury material itself.

Balanced against the interest in preserving uninhibited witness testimony and the primary interest of an individual acquitted of criminal charges, is the overriding Congressional determination that the judiciary shall have the responsibility and authority to police itself. The public and Congressional interest in the effective administration of the Act is compelling.[22] The Act requires a full, fair, and timely investigation by the Committee so that public confidence in

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22. This compelling public interest has been recognized in other comparable circumstances. For example, in In Re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) five policemen moved to vacate two prior district court orders authorizing disclosure to the Superintendent of Police of the grand jury transcripts of the policemen's testimony before the grand jury. In affirming the district court, the court of appeals noted that "[b]ecause the maintenance of police integrity and credibility is essential to public confidence, the

judicial integrity and credibility may be preserved. Society is entitled to have a mechanism that works to the end that innocent judges and magistrates are protected in their reputations and independence and that the judiciary is kept

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22. (Cont'd.)

disclosure of testimony by policemen to a police board in order to discipline those abusing public offices is a sufficient public interest to override the policy of shielding the grand jury from public scrutiny." Id. at 89B. The required need under Rule 6(e) was therefore satisfied. In United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977), aff'd sub nom. In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978) a proceeding under Rule 6(e) was instituted by the City of Omaha, the Council on Discipline of the Nebraska State Bar Association, the Nebraska Commission of Judicial Qualifications, and a member of the Judiciary Committee of the Nebraska Legislature to obtain grand jury materials that alleged misconduct by various government officials. The court observed that "[r]eestablishing faith in state and city governments by proving or disproving the faithfulness of [public] officials is a goal with enough urgency to carry a major part of a compelling and particularized need." 437 F. Supp. at 245.

honorable and perceived to be so. This Court, itself governed by the Act, cannot reasonably deny other judges access to information that will shed light on the truth. The Court has no evidence that Congress anticipated that this type of proceeding might be brought under the Act. Nevertheless, to deny the petition would thwart the broad intent of the Act, and not serve the traditional policy upon which grand jury secrecy is based. Since the request is within the authority of the Committee, the Court should "presumptively favor disclosure" to those who are charged with the responsibility for performing duties under this stage of the Act. Cf. In re Report and Recommendation of the June 5, 1972 Grand Jury, supra at 1227. The petition must be and will be granted.

III.

CONCLUSIONS

A. Disclosure to Committee

Disclosure to the Special Committee impinges only slightly upon the traditional interests that remain in preserving grand jury secrecy in this proceeding, while simultaneously allowing the Committee expeditiously to comply with its Congressional directive. The continuing interest of Judge Hastings in maintaining the validity of his acquittal cannot be gainsaid. This interest, however, must be subordinated to the public interest in the integrity and independence of the judiciary.[23] The Act requires that this inter-

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23. The public interest in the effective operation of the judicial branch has, in other circumstances, been deemed sufficient to permit disciplinary proceedings to be brought against members of the bar subsequent to their acquittal of criminal charges. See, e.g., In re Echeles, 430 F.2d 347, 350 (7th Cir. 1970) ("the real question at issue . . . is the public

est be vindicated through the judicial self-regulation mechanism it outlines. Prior acquittal of specific criminal charges does not obviate the need for further inquiry under the Act, for the Act encompasses any conduct "prejudicial to the effective and expeditious administration of the business of the courts." § 372(c)(1). At stake in the petition before the Court is nothing less than the public's faith and trust in the judicial system.

Furthermore, disclosure to the Committee, an arm of the judiciary,

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23. (Cont'd.)

interest and [the] right to continue to practice a profession imbued with the public trust"); Best v. State Bar of California, 57 Cal. 2d 633, ___, 371 P.2d 325, 328, 21 Cal. Rptr. 589, ___ (1962) (The proceeding "is for the protection of the public, the courts, and the legal profession."); Ohio State Bar Ass'n v. Weaver, 41 Ohio St. 2d 97, ___, 322 N.E.2d 665, 667 (1975) (Proceedings "are instituted to safeguard the courts and to protect the public.").

presents little risk of chilling the truthful testimony of prospective witnesses before future grand juries. Cf., Douglas Oil, supra at 219. The Committee is composed of judges who routinely have the duty to review grand jury materials in the performance of the duties of their offices. The Committee does not seek public dissemination, but disclosure only to itself, and is bound by the Act to keep "[a]ll paper, documents, and records of proceedings related to investigations . . . confidential." § 372(c)(14). Disclosure to the Committee carries none of the risks associated with disclosure to private or government petitioners. Cf., United States v. Sells Engineering, supra at 3142. The traditional sanctity of grand jury records will be substantially preserved by the character of the parties to whom the material will be disclosed and

the broad confidentiality provisions of the Act. In addition, the Court will impose in its order entered contemporaneously stringent "protective limitations on the use of the disclosed material" to further ensure confidentiality. Douglas Oil, supra at 223.

The unique circumstances out of which this petition arises, coupled with the status of the parties who will review the material and the confidentiality requirements of the Act, also make it inappropriate for this Court to conduct an in camera review of the grand jury records before their release. In the usual case, it is necessary to limit access solely "to that material directly pertinent to the need for disclosure." Douglas Oil, supra at 224; see also Proctor & Gamble, supra at 683 (disclosure is to be "discretely and limitedly"). This is usually accom-

plished by in camera inspection, see, e.g., United States v. Sobotka, 623 F.2d 764 768 (2nd Cir. 1980); United States v. Duff, 529 F.Supp. 148, 156 (N.D.Ill. 1981); In re Midwest Milk Monopolization Litigation, 454 F. Supp. 281, 287-88 (W.D.Mo. 1978), or other procedures that assure that the competing interests in secrecy and disclosure are properly evaluated, see, e.g., Douglas Oil, supra at 226-31; In re Grand Jury Proceedings (Wright II), 654 F.2d 268, 272-75 (3rd Cir.), cert. denied, 454 U.S. 1098 (1981); Illinois v. Sarbaugh, supra at 773; In re Disclosure of Testimony Before the Grand Jury (Troia), supra; United States v. Alston, 491 F.Supp. 215 (D.D.C. 1980). Here, however, Congress has imposed a duty upon this Special Committee to conduct a thorough investigation and evaluation of the complaint referred to it. It would

be contrary to the intent of the Act to allow this Committee access only to that grand jury evidence which this Court deems relevant. To do so would usurp the investigatory function Congress has placed within the exclusive province of the Special Committee.[24] Therefore, to the extent it has the discretion to make an in camera review of the grand jury material sought by this petition, this Court exercises its discretion not to do so.

B. Disclosure to Judge Hastings

Having concluded that the petition of the Special Committee shall be granted, the Court is presented with two additional

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24. Furthermore, the Court will not require that the Committee demonstrate that it had exhausted all alternative investigatory channels before seeking the material at issue here. Cf. United States v. Sells Engineering, supra at 3142; In re Grand Jury Proceedings, Miller Brewing Co., 687 F.2d 1079, 1092 n.17 (7th Cir. 1982).

issues: (1) whether Judge Hastings is entitled at this point to equal access, and (2) whether Judge Hastings is entitled to discovery and evidentiary rights to defend against disclosure. Counsel for Judge Hastings contends that both of these procedural issues must be resolved by the Court if the motion to dismiss the petition is denied.

Though neither the Act nor the Local Rules speak directly to these procedural issues, they do offer general guidance. The Act describes the Special Committee's responsibility with reference to both "investigations" and "proceedings." The structure of the Act and the "inquisitorial-administrative" model upon which it is based suggest a distinction between an "investigation" and a "proceeding." Cf. § 372(c)(5) and Eleventh Circuit Rule 5(a) with § 372(c)(11) and Eleventh

Circuit Rule 5(b). The sole duty at the investigatory stage of the Committee's work is to "conduct an investigation as extensive as it considers necessary." § 372(c)(5). This "broad flexibility and general authority to investigate," H.R. Rep. 1313, supra at 11, is unhindered by any specified procedural requirements. In contrast, the Act requires that any rules prescribed by the judicial councils or the Judicial Conference "for the conduct of proceedings" under the Act contain certain procedural rights. See § 372(c)(11). The "minimal due process rights," H.R. Rep. 1313, supra at 14, that must be afforded a judicial officer whose conduct is the subject of a complaint are

> an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine

> witnesses, and to present argument orally or in writing.

§ 372(c)(11)(B). The Eleventh Circuit Rules secure these rights in language that generally tracts the Act. See Eleventh Circuit Rule 5(b).

These procedural rights are intended to insure that the findings and recommendations of the Special Committee will not be arbitrary. See H.R. Rep. 1313, supra at 14. These procedural protections, however, are triggered only at the point "proceedings [are] conducted by" the Committee. § 372(c)(11)(B). This petition does not require this Court to determine the point at which a Special Committee's activities shall be denominated a "proceeding".[25] What is clear,

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25. But see Third Circuit Rule 1(E), which defines "proceeding" to mean "any meeting of a special committee . . .or of the Judicial Council at which record evidence is taken."

however, is that this petition, and the evidence that will be obtained from its grant, fall within the investigatory sphere of the Committee's activities. During the investigatory stage, the required procedural protections are minimal at most. See, e.g., Hannah v. Larche, 363 U.S. 420, 440-53 (1960): McCartney v. Commission on Judicial Qualifications, 116 Cal. Rptr. 260, 265, 526 P.2d 268, 273 (1974); In re Troy, 364 Mass. 15, _____, 306 N.E.2d 203, 207-09 (1973); In re "Judge Anonymous", 590 P.2d 1181, 1185-89 (Okla. 1978).[26]

There may or may not be "proceedings" resulting from the Committee's investigation in which, under the Act and our

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26. See also, Third Circuit Rule 6(B)(i) Reporters Note, indicating that "[w]itnesses can be interviewed and documents secured without the participation of the judge or magistrate whose conduct is the subject of the complaint."

traditional concepts of procedural due process, Judge Hastings will be entitled to the full range of defenses and procedures to effect them, but the Court's ruling on this investigative petition is not such a "proceeding."[27] The type and scope of the Judge's procedural rights at this stage of the Committee investigation is a matter whose final resolution is committed to the Judicial Council of the Eleventh Circuit and the Judicial Conference of the United States.

Under subsection (c)(11) of the Act, both the Judicial Council and the Judicial Conference have the authority to prescribe rules governing the procedural questions

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27. Before this court, Judge Hastings has been given all the process which he is due: notice and an opportunity to be heard. Cf. Fed. R. Crim. P. 6(e)(3)(D).

raised here.[28] In addition, the Act provides that a complainant or judicial officer "aggrieved by an action of the judicial council . . . may petition the Judicial Conference of the United States [or its standing committee established under 28 U.S.C. § 331] for review thereof." § 372(c)(1). The Court can assume, arguendo, that procedural questions might appropriately be raised in that forum.

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28. See § 372(c)(11). Subsection (c)(11) has given the judicial councils the flexibility to experiment and develop procedures under the Act. For example, three councils offer differing interpretations of the question whether the Federal Rules of Evidence should be applied at "proceedings" conducted by the special committee or the council. The First Circuit Rules state that "[t]he proceedings will be guided by but not bound by the Federal Rules of Evidence." See First Circuit Rule 14. The Second Circuit provides that "[a]t the request of the judicial officer whose conduct is the subject of a complaint, the Federal Rules of Evidence shall apply. See Second Circuit Rules 24(c). Finally, the Third Circuit provides that "[e]xcept where inappropriate, the provisions of the Federal Rules of Evidence shall govern." See Third Circuit Rules 6(D)(iv) and 7(D)(iv).

Thus, beyond those procedural rights mandated by subsection (c)(11), it is for the Judicial Conference or the judicial council to determine if, when, and what procedural protections shall be afforded a judicial officer subject to a complaint under the Act.[29] Cf. In re Imperial "400"

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29. See also, H.R. Rep. 1313, supra at 4. ("[R]ather than create luxurious mechanisms such as special courts and commissions--with all the trappings of the adversarial process, including legal counsel, written transcripts, discovery and cross examination, the legisla[tion] plac[es] primary administrative responsibility within the judicial branch of government.")

The Court notes that at oral argument, counsel for the Committee suggested that the Committee could not issue its report without a "proceeding" under subsection (c)(11). Counsel indicated that Judge Hastings would be given access to the grand jury material if such a "proceeding" were to occur. The Court expresses no opinion as to the validity of counsel's suggested procedure. But see Third Circuit Rule 6(c), which provides that "[t]he judge or magistrate whose conduct is the subject of the complaint shall have access to all documents before the Special Committee at such time as is appropriate in light of the needs of the Special Committee's investigation and the [right to receive notice and an opportunity to appear or present argument.]."

National, Inc., 481 F.2d 41, 47-49 (3rd Cir.), cert. denied sub nom. Judicial Council of the Third Circuit v. Nolan, 414 U.S. 880 (1973). Judge Hastings' request that this Court afford him certain procedural rights and protections is therefore premature.[30] See Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970).

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30. Since the responsibility for developing procedural rules lies with the judicial council and the Judicial Conference, the Court cannot agree with Judge Hastings's vigorous assertion that the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence must apply to the resolution of this petition. This is an extraordinary proceeding where the judicial power has been invoked to resolve an administrative matter wholly within the judicial branch of government. Judge Hastings is not a defendant before this Court; the Committee is neither plaintiff nor prosecutor. This proceeding thus bears few of the indicia usually found in those actions to which the federal rules apply.

DECISION

For the foregoing reasons, the Court finds that the substantial interest in judicial accountability, integrity, and independence -- safeguarded by the Act's self-discipline mechanism -- significantly outweighs the lesser public interest in precluding the narrowly circumscribed, non-public disclosure sought by the Committee for its limited statutory purpose. Therefore, the petition of the Special Committee will be GRANTED, the motion to dismiss the petition will be DENIED, and the cross-petition for full public disclosure will be DENIED in a separate Order filed contemporaneously with this Opinion.

/s/ Eugene A. Gordon
United States District Judge

December 19, 1983*

[*Court's Appendix omitted because statute is separately reproduced in this Appendix, infra.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE PETITION TO INSPECT AND COPY GRAND JURY MATERIALS	)))	NO. 81-1-GJ (MIA)

O R D E R

For the reasons discussed in a Memorandum Opinion filed contemporaneously herewith,

IT IS ORDERED that the petition filed by the Special Committee of the Judicial Council of the Eleventh Circuit to inspect the grand jury records in United States v. Hastings, 81-596-Cr., Grand Jury No. 81-1-GJ (MIA) is GRANTED, subject to the conditions set out in this Order; the motion of Judge Alcee L. Hastings to dismiss the petition is DENIED; and the cross-petition of Judge Alcee L. Hastings for Public disclosure of the Grand Jury Records is DENIED.

1. IT IS FURTHER ORDERED, that the United States Attorney for the Southern

District of Florida (Miami) shall procure and disclose to the Special Committee and its two designated counsel all records, transcripts, minutes, and exhibits of Grand Jury 81-1-GJ (MIA). The Committee and counsel shall have access to these Grand Jury Records from the tenth (10th) day following the date of the entry of this Order, and for a period of ninety (90) days thereafter.

2. IT IS FURTHER ORDERED, that the only persons to whom the Grand Jury Records are to be disclosed are the Special Committee Members, Hon. John C. Godbold, Hon. Gerald B. Tjoflat, Hon. Frank M. Johnson, Jr., Hon. Sam C. Pointer, Jr., Hon. William C. O'Kelley, and the Committee's Counsel, John Doar, Esq. and G. Stewart Webb, Jr., Esq. In addition, the Special Committee shall designate one additional person to provide

secretarial assistance to the Committee and counsel. The person so designated shall execute a written oath before an Article III Judge not to reveal any matters that occurred before the grand jury, unless ordered to do so by this Court.

3. IT IS FURTHER ORDERED, that the Special Committee and its counsel shall review the material in the office of the United States Attorney for the Southern District of Florida at Miami, or at some other place mutually agreeable to the Committee and the United States Attorney in the United States Courthouse, Miami, Florida. The United States Attorney for the Southern District of Florida shall have the responsibility for implementing the provisions of this Order and the continuous responsibility for preserving the secrecy of the Grand Jury Records.

4. IT IS FURTHER ORDERED, that the review of the Grand Jury Records shall take place at such hours as are mutually convenient for the United States Attorney and the Committee. No persons other than the members of the Special Committee and Messrs. Doar and Webb shall be allowed to be present in the room while any substantive discussion of the Records is taking place. The Office of the United States Attorney shall provide such other security measures as will ensure the secrecy of the Grand Jury Records, including but not limited to a log noting the datas and times the records are reviewed, and the names of the persons conducting the review. The log shall be recorded by the United States Attorney or a designated United States Marshal. The log shall be maintained separate and apart from all other records and files, under appropriate

security precautions as to ensure confidentiality.

5. IT IS FURTHER ORDERED, that except as provided in Paragraph Six (6) of this Order, there shall be no reproduction of the Grand Jury Records, by photocopying, electronic reproduction or recording, or by any other means, manual or mechanical. The members of the Special Committee and Messrs. Doar and Webb may take written or recorded notes of the records reviewed. These notes, however, shall remain in their sole and absolute possession, and shall not be reproduced nor viewed by any person not associated with the Committee. In addition, the members of the Special Committee and counsel shall maintain a confidential master index describing each Grand Jury document reviewed in the course of the investigation.

6. IT IS FURTHER ORDERED, that the Special Committee and Messrs. Doar and Webb shall be permitted to make one (1) copy of those Grand Jury Records necessary to substantiate or supplement the written report required under 28 U.S.C. § 372(c)(5). These copies shall be sealed and remain with the United States Attorney for the Southern District of Florida at Miami, except during those periods when the copies shall be necessary for the Special Committee to execute its duty under 28 U.S.C. § 372(c)(5). Thereafter, the copies shall be returned to the United States Attorney for the Southern District of Florida and replaced under seal. There shall be no other reproductions made of the Grand Jury Records without leave of this Court.

7. IT IS FURTHER ORDERED, that the members of the Special Committee, Messrs.

Doar and Webb, and the secretarial assistant provided for in Paragraph Two (2) of this Order shall hold in the strictest confidence all information and inferences that may be gleamed from the Grand Jury Records.

8. This Court retains its authority and control over the Grand Jury Records. This Order, however, shall not be construed to deny the Special Committee any powers reserved to it under 28 U.S.C. § 372(c).

/s/ Eugene S. Gordon
United States District Judge

December 19, 1983

C. Orders on Rehearing and Stay of Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5003

IN RE PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

THE HONORABLE ALCEE L. HASTINGS,
Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING
(Opinion June 20, 1984, 11 Cir., 1984, F.2d).
(August 3, 1984)

Before CAMPBELL*, Chief Judge, PELL** and KEARSE***, Circuit Judges.

*Honorable Levine H. Campbell, Chief Judge for the U.S. Court of Appeals for the First Circuit, sitting by designation.

**Honorable Wilbur F. Pell, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

***Honorable Amalya Lyle Kearse, U.S. Circuit Judge for the Second Circuit, sitting by designation.

BY THE COURT:

By way of clarification, the opinion is amended by inserting at page 4231, column 2, line 30, after the period, "To all appearances," and changing the capital "T" in "The" to lower case. The first full sentence on Page 4232 is revised to read as follows:

> To be sure, if it had been brought out that the grand jury minutes were likely to include substantial separable material unrelated to any proper object of the Committee's investigation, a different order might have been appropriate, but this is not such a case.

The petition for rehearing is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5003

IN RE: PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

THE HONORABLE ALCEE L. HASTINGS,
Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

* * *

(xx) The motion of appellant for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including August 27, 1984, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of

this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this court within that time.

* * *

/s/ Levin H. Campbell
UNITED STATES CIRCUIT JUDGE

D. Other Materials

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE PETITION TO INSPECT AND COPY GRAND JURY MATERIALS	:	Misc. No.

PETITION OF THE INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT TO INSPECT AND COPY GRAND JURY MATERIALS

The Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee"), by its undersigned counsel, respectfully petitions this Court for an order permitting the committee, or its designated representatives, to inspect and copy certain grand jury materials for use in connection with an investigation and proceeding under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c) (the "1980 Act"). As grounds for this Petition, the Committee states:

1. A verified complaint has been filed with the clerk of the United States Court of Appeals for the Eleventh Circuit pursuant to the 1980 Act and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. § 372(c), as promulgated by the Judicial Council of the Eleventh Circuit. The complaint alleges that United States District Judge Alcee L. Hastings has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.

2. By order entered March 29, 1983, the Chief Judge of the Eleventh Circuit, acting pursuant to 28 U.S.C. § 372(c)(4), appointed the Committee to investigate the facts and allegations of the complaint. Under 28 U.S.C. § 372(c)(5), the Committee "shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written

report thereon with the judicial council of the circuit."

3. On December 29, 1981, a duly convened grand jury in and for the Southern District of Florida returned an indictment in case No. 81-596 charging William A. Borders, Jr. with violation of 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 1503 (obstruction of Justice) and 18 U.S.C. § 1952 (interstate travel with intent to commit a crime), and charging Alcee L. Hastings with violation of 18 U.S.C. § 371 (conspiracy) and 18 U.S.C. § 1503 (obstruction of justice).

4. As part of its investigation of the facts and allegations of the complaint filed against Judge Hastings, the Committee has determined that it must examine the record, transcript, minutes and exhibits of the proceedings of the grand jury that indicted Judge Hastings and

Mr. Borders. By this Petition, the Committee seeks access to those grand jury materials.

5. The record, transcript, minutes and exhibits of the aforesaid grand jury are in the custody of the United States District Court for the Southern District of Florida.

6. The Committee is required by statute to conduct and maintain its proceedings in confidence. 28 U.S.C. § 372(c)(14). Release of grand jury materials to the Committee will not, therefore, constitute public disclosure. Grand jury materials disclosed to the Committee will not be further disclosed, except in accordance with 28 U.S.C. § 372(c)(14).

7. The persons having an interest in this Petition are:

(A) Hon. Alcee L. Hastings, United States District Judge;

(B) William C. Borders, Jr.; and

(C) United States Department of Justice (Reid Weingarten, attorney, Public Integrity Section, Criminal Division, Washington, D.C.).

8. On April 29, 1983, the Committee moved to obtain the grand jury materials in United States v. Hastings, 81-596-Cr.-ETG. Judge Hastings, by counsel, filed a written objection to the committee's motion, arguing that the grand jury materials must be sought in a separate civil proceeding. To eliminate any question as to the Court's jurisdiction, the Committee is filing this Petition.

9. By memorandum dated May 23, 1983, the Hon. Edward T. Gignoux, United States District Judge, established a briefing schedule for the Committee's motion in the criminal case, and for other pending

motions as well, and set oral argument for June 24, 1983. To ensure the expeditious resolution of this Petition, the Committee requests that this Petition be set for hearing at the same time and place and in conjunction with the hearing on the motions pending in the criminal case -- to wit, at the United States District Court for the Southern District of Florida, in Miami, Florida, on Friday, June 24, 1983, at 10:00 a.m.

10. In support of this Petition, the Committee further relies upon the accompanying memorandum.

WHEREFORE, the Committee asks this Court as follows:

(1) To set this Petition for hearing for June 24, 1983, at 10:00 a.m., at the United States District Court in Miami, Florida.

(2) At the conclusion of the aforesaid hearing, to enter an order directing

the Clerk of the United States District Court to transmit to the Investigating Committee forthwith the record, transcripts, minutes and exhibits of the proceedings of the grand jury that returned the indictment in case No. 81-596 against William A. Borders, Jr. and Alcee L. Hastings.

June 2, 1983

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E. Statute and Rule

1. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372, 604 (1982)

An Act

To revise the composition of the judicial councils of the Federal judicial circuits, to establish a procedure for the processing of complaints against Federal judges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980".

JUDICIAL COUNCILS OF THE CIRCUITS

SEC.2.(a) Section 332(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit, consisting of--

"(A) the chief judge of the circuit who shall preside;

"(B) that number of circuit judges fixed by majority vote of all such judges in regular active service; and

"(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that--

"(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparaqraph shall be no less than two; and

"(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

"(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

"(3) The number of circuit and district judges fixed in accordance with paragraphs (1)(B) and (1)(C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting of the council so constituted.

"(4) Only circuit and district judges in regular active service

shall serve as members of the council.

"(5) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

"(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

"(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit."

(b) Section 332(c) of title 28,

United States Code, is amended by striking out "quarterly" and inserting in lieu thereof "semiannually".

(c) Section 332(d) of title 28, United States Code, is amended to read as follows:

(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas

duces tecum issued on behalf of the United States or an officer or agency thereof.

"(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

"(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council."

(d)(1) The section heading for section 332 of title 28, United States Code, is amended to read as follows:

"§ 332. Judicial councils of circuits".

(2) The item relating to section 332 in the section analysis for chapter 15 of title 28, United States Code, is amended to read as follows:

"332. Judicial councils of circuits."

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC.3.(a) Section 372 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

"(2) Upon receipt of a complaint filed under paragraph (1) of this

subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term 'chief judge'). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

"(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may--

"(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural

ruling or (iii) frivolous; or

"(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

"(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--

"(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

"(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

"(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

"(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

"(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council--

"(A) may conduct any additional investigation which it considers to be necessary;

"(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

"(i) directing the chief judge of the district of magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

"(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

"(iii) rquesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

"(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

"(v) censuring or reprimanding such judge or magistrate by means of private communication;

"(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

"(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order

removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title; and

"(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

"(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of

the United States.

"(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct--

"(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or

"(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

"(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

" 8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be

warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

"(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

"(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

"(10) A complainant, judge, or magistrate aggrieved by a final

order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

"(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that--

"(A) Adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

"(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to

cross-examine witnesses, and to present argument orally or in writing; and

"(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information."

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

"(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon

the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

"(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

"(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceedings unless--

"(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by

resolution, releases any such material which is believed necessary to an impeachment investigation or trial or a judge under article I of the Constitution; or

"(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

"(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate

clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

"(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

"(17) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for

the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection."

(b) The section heading for section 372 of title 28, United States Code, is amended to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline."

(c) The item relating to section 372 in the section analysis for chapter 17 of title 28, United States Code, is amended to read as follows:

"372. Retirement for disability; substitute judge on failure to retire; judicial discipline."

AUTHORITY OF THE JUDICIAL CONFERENCE

SEC. 4. The fourth undesignated paragraph of section 331 of title 28, United States Code, is amended to read as follows:

"The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all

petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial

officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section."

ADMINISTRATIVE OFFICE
OF UNITED STATES COURTS

SEC. 5. Section 604 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h)(1) The Director shall, out of funds appropriated for the operation and maintenance of the courts, provide facilities and pay necessary expenses incurred by the judicial councils of the circuits and the Judicial Conference under section 372 of this title, including mileage allowance and witness fees, at the same rate as provided in section 1821 of this title. Administrative and professional assistance from the Administrative Office of the United States Courts may be re-

quested by each judicial council and the Judicial Conference for purposes of discharging their duties under section 372 of this title.

"(2) The Director of the Administrative Office of the United States Courts shall include in his annual report filed with the Congress under this section a summary of the number of complaints filed with each judicial council under section 372(c) of this title, indicating the general nature of such complaints and the disposition of those complaints in which action has been taken."

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 7. This Act shall become effective on October 1, 1981. Approved October 15, 1980.

2. Rule 6(e), Federal Rules of Criminal Procedure

Rule 6. The Grand Jury

* * *

(e) Secrecy and Disclosure.

(1) Recording of Proceedings.

. . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy.

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . .

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

. . .

(C) Disclosure otherwise prohibited by this rule of matters

occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceedings;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

Office - Supreme Court, U.S.
FILED
SEP 27 1984
ALEXANDER L. STEVAS
CLERK

No. 84-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

AND

THE UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 735 F.2d (No. 2) 1261.

QUESTIONS PRESENTED

The questions presented for review as formulated by Petitioner do not comply with the requirements of Rule 21.1(a) of the Rules of the Supreme Court. Petitioner's four questions are improperly argumentative, and Question 2, which asserts misuse of the grand jury, and Question 3, which challenges an Act of Congress, are not

fairly raised by the record. Respondent respectfully submits that the record below raises only a single question that is very narrow in scope. That question may be stated as follows:

1. Whether the District Court possessed the authority to grant the petition of a special committee, composed of Article III Judges and convened pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 to investigate and report on a complaint filed thereunder against a United States District Judge, for limited access to the records and evidence before a grand jury, now discharged, that returned an indictment against the Judge under investigation.

The foregoing question includes the following subsidiary question: (a) Whether the District Court abused its discretion in exercising its authority and permitting the special committee restricted access to the requested grand jury materials.

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3. Question 3 and Reason 2, which challenge the constitutionality of the Act, are not fairly raised by the record. Judge Hastings repeatedly advised the courts below that the constitutionality of the Act was not at issue in this case, and the lower courts did not decide that question. 40

4. Reason 3 has no validity. Once the Rule of Necessity is found to apply, the decision of the Court of Appeals is entitled to the same weight and respect as any other decision 43

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No. 84-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

AND

THE UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit ("the Committee") initiated this proceeding below as part of its investigation into the facts and allegations of a complaint filed against Petitioner, United States District Judge Alcee L. Hastings, under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§331, 332, 372(c), 604 (1982). On June 3, 1983, the Commttee petitioned the United States District Court for the Southern District of Florida for limited access to certain grand jury materials under the control of that court (App. 110-16).

The lower courts have supported the Committee's request for access to the grand jury materials. On December 20, 1983, the District Court (per Gordon, J., by designation)[1/] entered a Memorandum Opinion, reported at 576 F. Supp. 1275 (App. 59-98), granting the Committee's petition and allowing restricted access to the grand jury materials. Although Judge Gordon recognized that the Committee sought only access to the materials for use in connection with proceedings that

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1/ All of the regular judges of the Southern District of Florida recused themselves from consideration of the Committee's petition. The Chief Justice thereafter specially designated the Honorable Eugene A. Gordon, Senior Judge of the United States District Court for the Middle District of North Carolina, to sit as a judge of the Southern District of Florida for the purposes of this case.

are confidential under the Act,[2/] he took the added step of imposing "stringent 'protective limitations on the use of the disclosed material' to further ensure confidentiality." (App. 87). Those protective limitations are set forth in a separate Order filed on December 20, 1983 (App. 99-105). The Order expressly restricted access to the five judges who constitute the Committee, its two counsel and a secretary who must execute a written oath of confidentiality before an Article III Judge (App.

[2/] The Act expressly provides for confidentiality. Under Section 372(c)(14), "[a]ll papers, documents, and records of proceedings related to investigations . . . shall be confidential and shall not be disclosed by any person" except under certain narrow circumstances set forth in the statute. 28 U.S.C. §372(c)(14)(1982).

100-01). Judge Gordon futher directed that the inspection of the grand jury materials was to take place in the office of the United States Attorney for the Southern District of Florida or at some other place mutually agreeable to the Committee and the United States Attorney in the Courthouse, and he made the United States Attorney responsible "for implementing the provisions of this Order and...for preserving the secrecy of the Grand Jury Records." (App. 101) The Order also placed restrictions on copying the materials (App. 104).

Judge Hastings timely noticed an appeal to the United States Court of Appeals for the Eleventh Circuit. The regular judges of the Eleventh Circuit recused themselves, and the Chief Justice designated a special panel to

hear the appeal.[3] On June 20, 1984, the Court of Appeals issued a unanimous opinion, authored by Judge Campbell (App. 1-58), affirming "the restricted access granted by the district court" (App. 57).

The Committee has not yet been allowed to inspect the grand jury materials. On February 3, 1984, the Court of Appeals stayed the District Court's Order of December 20, 1983 and expedited the appeal. In its opinion of June 30, 1984, the Court of Appeals

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[3] The panel was composed of the Honorable Levine H. Campbell, Chief Judge of the United States Court of Appeals for the First Circuit, the Honorable Wilbur F. Pell, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, and the Honorable Amalya Lyle Kearse, Circuit Judge of the United States Court of Appeals for the Second Circuit.

directed that the stay shall be lifted upon issuance of the mandate (App. 57). Judge Hastings thereafter sought a stay of the mandate pending applicaton to the Supreme Court for a writ of certiorari. On August 13, 1984, Judge Campbell entered an order staying the issuance of the mandate until August 27, 1984 with the stay to continue in force until final dispostition of the case by the Supreme Court upon a timely filing of a petition for writ of certiorari (App. 108-09). After Judge Hastings filed his Petition, the Committee applied for an order vacating the stay. Justice Powell denied the Committee's application on September 7, 1984. The stay of the District Court's Order, therefore, remains in effect.

(a) Statement of Facts

On December 29, 1981, Grand Jury 81-1 of the Southern District of Florida returned an indictment charging Judge Hastings and William A. Borders, Jr., an attorney, with conspiring to solicit and accept a bribe in exchange for influencing the outcome of a criminal case pending before Judge Hastings (App. 112). The trial of Borders was severed and transferred to the Northern District of Georgia. On May 7, 1982, Borders was convicted after trial by jury, and the Eleventh Circuit subsequently affirmed that conviction. United States v. Borders, 633 F.2d 1318 (11th Cir. 1982), cert. denied, 103 S. Ct. 1875 (1983). On January 19, 1983, the trial of Judge Hastings commenced before a jury in

the Southern District of Florida. On February 4, 1983, the jury returned a verdict of not guilty on both counts of the indictment.

On March 17, 1983, Wm. Terrell Hodges, Chief Judge of the Middle District of Florida, and Anthony A. Alaimo, Chief Judge of the Southern District of Georgia, filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit a verified written complaint against Judge Hastings under the Act and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. §372(c), as promulgated by the Judicial Council of the Eleventh Circuit. The complaint, which was later made a part of the public record by Judge Hastings, contains six counts alleging that Judge Hastings has engaged in conduct

prejudical to the effective and expeditious administration of the business of the courts. The first count of the complaint is based on the same allegations as the criminal indictment.

On March 29, 1983, the Honorable John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, entered an order appointing a special committee - the Respondent Investigating Committee - to investigate the facts and allegations of the complaint. The members of the Committee are Chief Judge Godbold, Circuit Judge Gerald B. Tjoflat, Circuit Judge Frank M. Johnson, Jr., District Judge Sam C. Pointer and District Judge William C. O'Kelley. This Commitee is statutorily empowered and required under the Act to "conduct an investigation as

extensive as it considers necessary, and [to] expeditiously file a comprehensive written report thereon with the judicial council of the circuit." 28 U.S.C. §372(c)(5)(1982).

The Committee sought access to the grand jury materials as part of its investigation of the complaint filed against Judge Hastings. As represented in the petition filed in the District Court, the Committee has determined that in the performance of its statutory duty to make a complete and thorough investigation, it should review the record, transcript, minutes and exhibits of the proceedings of the grand jury that indicted Judge Hastings and Borders (App. 112-113).

(b) Opinion of the District Court

The Committee addressed its petition to the inherent supervisory

authority of a district court to permit disclosure of grand jury materials in extraordinary and limited circumstances. The Committee did not rely upon the specific provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, although Judge Hastings argued below, as he must now, that Rule 6(e) provides the exclusive framework for disclosure of grand jury materials.

The District Court ordered disclosure to the Committee pursuant to its general supervisory authority over grand jury proceedings and records. It was "not persuaded that a Committee composed of Article III judges, acting as an arm of the judiciary and in furtherance of a Congressional mandate, has no autnority other than that given by Rule 6(e) to review grand jury

material." (App. 75-76). That Rule, the District Court concluded, "is not the sole repository of the district court's authority to grant access to grand jury records.... The inherent power of the supervising court will be affirmatively exercised only if the recognized need for the material outweighs the traditional considerations justifying secrecy." (App. 76-77). The unusual circumstances of the Committee's petition thus required the District Court "to balance the need for effective administration of the Congressionally established procedure for judicial self-discipline against the traditional factors favoring the '"indispensable secrecy of [the] grand jury proceedings."'" (App. 77, quoting from United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958)).

The District Court struck the balance in favor of disclosure: "[T]he substantial interest in judicial accountabilty, integrity, and independence - safeguarded by the Act's self-discipline mechanism - significantly outweighs the lesser public interest in precluding the narrowly circumscribed, non-public disclosure sought by the Committee for its limited statutory purpose." (App. 98).

(c) Opinion of the Court of Appeals

The Court of Appeals "support[ed the District Court's] analysis in the special circumstances of a judicial investigation under section 372(c)" of the Act (App. 21). Its opinion makes clear that this case differs markedly from "'garden variety' petitions for grand jury disclosure" and that

"courts are not empowered to act outside Rule 6(e) in other than exceptional circumstances consonant with the rule's policy and spirit." (App. 28) But, a thorough review of the case law and the history of Rule 6(e) lead the Court of Appeals to conclude that "[t]he district court's belief that it had inherent power beyond the literal wording of Rule 6(e) is amply supported." (App. 22).

Having approved the inherent authority for disclosure, the Court of Appeals next considered the exercise of that authority. It concluded that "a petition by a judicial investigating committee presents one of the occasions when a district court may act outside the strict bounds of Rule 6(e), in reliance upon its historic supervisory power." (App. 42). The

Court of Appeals supported this conclusion developing "the unique character of the Committee, the scope of its investigative powers, and the importance of its mission" (App. 22), and by exploring "the close correspondence between the present situation and the express exception to grand jury secrecy allowed in Fed. R. Crim. P. 6(e)(3)(C)(i)." (App. 37).

The Court of Appeals placed great weight on the Congressional mandate behind the Committee's petition:

> We think it highly significant that the grand jury materials in question were sought by an investigating committee acting pursuant to express statutory authority to 'conduct an investigation as extensive as it considers necessary....' 28 U.S.C. §372(c)(5) (emphasis added). There is every indication that Congress meant this open-ended grant to be read just as broadly as it is written. The House Report on

the Act states that 'Paragraph (c)(5) provides the special committee with broad flexibilty and general authority to investigate the facts and allegations contained in the complaint.' H.R. Rep. No. 1313, 96th Cong., 2d Sess. 11 (1980) (emphasis added). And the unique composition of an investigating committee makes such an extensive delegation reasonable. The federal judges who compose it are sheltered by Article III, and must as an obligation of their office conduct an unbiased, objective inquiry. They are suited by experience and professional training to determine what evidence needs to be examined, and to deal discreetly with all types of evidence, including confidential materials like those here in issue.

Moreover, the question under investigation -- whether an Article III judge should be recommended for impeachment by the Congress, otherwise disciplined, or granted a clean bill of heath -- is a matter of great societal importance. Given the character of an investigating committee and what is at stake -- the public confidence in the judiciary, the independence and reputation

> of the accused judge -- paragraph (c)(5) must in our view be read, with very few strings, as conferring authority to look into whatever is material to a determination of the truth or falsity of the charges.

(App. 29-31) (footnote omitted).

The "closely analogous" circumstances between the Committee's petition and the provisions of Rule 6(e)(3)(C)(i) for disclosure (App. 21-22) provided a "further justification" in the appellate court's view "for the [district] court's invocation of its inherent power" (App. 37). Rule 6(e)(3)(C)(i) expressly permits a district court to order disclosure of grand jury materials "preliminary to or in connection with a judicial proceeding." The Court of Appeals acknowledged that "the circuit council and Judicial Conference proceedings

[under the Act] to which an investigating committee's investigation is ancillary are not proceedings before any identifiable court, and for this reason, may not be a 'judicial proceeding' within the precise language of the exception." (App. 37). But a review of the role and procedures of the judicial council in a proceeding under the Act convinced the Court of Appeals that "a council's review is little removed from the judicial proceedings encompassed within the Rule 6(e)(3)(C)(i) exception, whether or not it is a judicial proceeding in the strict legal sense." (App. 41). Accordingly the Court of Appeals concluded that "[d]isclosure to an investigating committee is ... closely

akin to a Rule 6(e)(3)(C)(i) disclosure 'preliminary to...a judicial proceeding.'" (App. 41).

REASONS FOR DENYING THE WRIT

1. The decisions of the District Court and the Court of Appeals, granting the Investigating Committee restricted access to grand jury materials, are consistent with the prior decisions of this Court and not in conflict with the decision of any other federal court of appeals.

The first reason advanced in the Petition for granting review is essentially an argument that the lower courts wrongly decided the case. Judge Hastings is unable to point to any conflict among the Circuits on the issue of disclosure of grand jury materials to a special investigating committee under the Act because no other federal court of appeals has yet to consider the issue. He, instead, attempts to create a conflict between

the decision of the Court of Appeals and "specific principles articulated" (Pet. at 25) by this Court in five decisions on disclosure of grand jury materials.[4/] The five decisions cited by Judge Hastings address entirely different circumstances and concerns than those presented by the Committee's petition. Each of those cases arose under the provisions of Rule 6(e) for disclosure; and none involved, much less required this Court to consider, the inherent supervisory authority of a district court

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[4/] The five decisions are United States v. Baggot, 103 S. Ct. 3164 (1983), United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1984), Illinois v. Abbott & Associates, Inc., 103 S. Ct. 1356 (1983), Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), and United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

to permit restricted access to grand jury materials under circumstances at all similar to this case.

Nor does the decision of the Court of Appeals represent "a dramatic departure from...decisional jurisprudence" as Judge Hastings argues (Pet. at 20). To the contrary, the Court of Appeals drew from existing authority to craft an opinion fully consistent with that authority. Although approving disclosure outside the strict bounds of Rule 6(e), the Court of Appeals still considered the requirements of the Rule and reasoned that "[p]ermitting...a [judicial investigating] committee to have access to grand jury materials in proper circumstances would be consistent with the policy and spirit of Rule 6(e)." (App. 42). The Court of Appeals then

applied established principles in concluding that the District Court had exercised its authority in "proper circumstances" and "with due regard to the standards for disclosure enunciated by the Supreme Court." (App. 42-43).

Reason 1 in the Petition rests on the unstated proposition that Rule 6(e) provides the exclusive means for disclosure of grand jury materials. The Court of Appeals held otherwise, concluding that the existence of a district court's inherent supervisory authority to allow disclosure under exceptional circumstances "is amply supported." (App. 22). The Court of Appeals was correct in this conclusion.

In Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959), this Court noted that Rule

6(e) "is but declaratory of" the principle "regarding disclosure as committed to the discretion of the trial judge." See also Notes of Advisory Committee on Rules following Fed. R. Crim. P. 6. The Court of Appeals read this pronouncement on Rule 6(e) as meaning "that the rule is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court." (App. 23).

The Court of Appeals found further support for the existence of inherent authority in the history of Rule 6(e). It viewed that history as "offer[ing] an interesting picture of how courts' 'inherent power' has shaped the rule" (App. 24), and it

pointed to several instances where the Rule had been amended to reflect prior judicial decisions allowing disclosure under circumstances not specifically enumerated in the Rule (App. 25-26). From this history, the Court of Appeals concluded "that the exceptions [in Rule 6(e)] permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance with the rule's general rule of secrecy." (App. 26-27).

Other federal courts have also held that Rule 6(e) is not the sole repository of a district court's authority to grant access to grand jury materials. The leading decision is In re Report & Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C.), mandamus denied sub

nom. Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974), where Judge Sirica invoked this inherent authority to order that certain grand jury materials be turned over to the Committee on the Judiciary of the House of Representatives for use in the impeachment inquiry into the conduct of former President Nixon. Upon an extended analysis of the historic function of the grand jury, Judge Sirica concluded: "Rule 6(e) which was not intended to create new law, remains subject to the law or traditional policies that give it birth." 370 F. Supp. at 1229. See also In re Biaggi, 478 F.2d 489 (2d Cir. 1973).

The analysis of the Court of Appeals in recognizing the existence of inherent authority does not conflict with the five decisions of this

Court cited by Judge Hastings. This Committee is not a private litigant seeking access to grand jury materials for use in private litigation as in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), where the Court was concerned with ensuring that the appropriate district court pass on the need for the material. The Committee is not a state attorney general or other law enforcement agency seeking to investigate possible violations of the antitrust laws as in Illinois v. Abbott & Associates, Inc., 103 S. Ct. 1356 (1983). There, the Court was reluctant to read into Rule 6(e) an exception when Congress had, the Court believed, not expressly provided that the State Attorneys' General were automatically entitled to obtain grand jury materials. It is

not the Department of Justice or the Internal Revenue Service seeking to develop information about possible civil tax liability by utilizing the fruits of a grand jury investigation as in United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983), and United States v. Baggot, 103 S. Ct. 3164 (1983). In those situations, the Court was concerned about the possibility of undetected abuse and was firm in requiring the agencies to demonstrate to a court why and in what connection it was necessary to obtain the material.[5/]

[5/] In Baggot, this Court discussed the requirement of a "judicial proceeding" for disclosure under Rule 6(e)(3)(C)(i). The Court of Appeals found that the review under the Act by the Judicial Council of the Committee's work

(Footnote continued)

This Committee is a body of federal judges appointed pursuant to a congressionally established procedure for investigating and reporting on allegations of conduct by a federal judge prejudicial to the effective and expeditious administration of the business of the courts. It does not possess the investigatory resources of a state attorney general's office or an administrative agency or the

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(Footnote continued)

involves a "judicial inquiry" and "is little removed from the judicial proceedings encompassed within the Rule 6(e)(3)(C)(i) exception" (App. 41). See pages 17-19 supra. In recognizing the inherent authority of the district court, the Court of Appeals was hardly trying, as Judge Hastings now argues, "to avoid the 'judicial proceeding' requirement of Rule 6(e)(3)(C)(i)." (Pet. at 29).

Department of Justice; but the work of the Committee involves a matter of the utmost importance -- the integrity of the federal judicial system. The surest way to protect that integrity is for the Committee to get to the bottom of the allegations against Judge Hastings one way or the other. To this end, Congress has conferred upon the Committee the statutory authority to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. §372(c)(5) (1982). The Court of Appeals properly recognized and considered the membership of the Committee and the importance of its work (App. 29-31).

The Court of Appeals did not, however, simply rest its decision on these distinctions. Nor did it sanction the type of automatic disclosure

sought but rejected in Illinois v. Abbott & Associates, Inc., supra. Rather, the Court of Appeals specifically examined the District Court's disclosure order under "the standards for disclosure enunciated by the Supreme Court." (App. 43). Those standards as identified and applied by the Court of Appeals are the very ones set forth in the decisions cited by Judge Hastings. Although those decisions do not address the issue of inherent authority, they do provide standards for deciding when disclosure is appropriate once the authority has been established, and the Court of Appeals carefully followed those standards (App. 42-56). In particular, the Court of Appeals applied the balancing test set forth in Douglas Oil Co. v Petrol Stops Northwest, supra, 441

U.S. at 223: "disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy...." (App. 43-44). True to this test, the Court of Appeals examined the Committee's need for the grand jury records (App. 45-49) and the secrecy interest (App. 50-53). It then struck the balance in favor of disclosure (App. 53-56).

On the issue of need, the Court of Appeals focused on the mission of the Committee:

> A thorough investigation is essential not only to ensure the integrity of federal judges, but also to instill public confidence in the judiciary.... The Committee must be able to represent to the [Judicial] Council, and the Council must be satisfied, that all available evidence of possible materiality has been sifted: for the Committee to examine matters extensively and find nothing may be as much a part of its duty as to

> look at evidence whose incriminating nature is known in advance. The object of the investigation is not to prove a case against the judge but to determine whether there is or is not a case.

(App. 45-46). Based on this mission and the "special responsibilties" of the Committee, the Court of Appeals "believe[ed] the Committee satisfied the 'particularized need' standard by demonstrating a close nexus between the subject of the grand jury proceeding and the complaint under investigation." (App. 49). The flexible standard of need as articulated by this Court in Douglas Oil and in United States v. Sells Engineering, Inc., supra, requires no more.

The Court of Appeals evaluated the secrecy interest in light of the factors identified in United States v. Rose, 215 F.2d 617, 628-29 (3d Cir.

1954), and adopted by this Court in United States v. Procter & Gamble Co., supra, 356 U.S. at 681-82 n.6 (App. 50). Under those factors, the Court of Appeals found a "'reduced' interest in secrecy" that "is further diminished in this case when the identity of the party requesting access is considered." (App. 51-52). Such a consideration was expressly approved in United States v. Sells Engineering, Inc., supra, 103 S. Ct. at 3149, where this Court noted "a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public." Granting access to a special committee of federal judges,

under a statute that mandates confidentiality, poses even less of a risk of any improper disclosure.

In weighing these competing concerns, the Court of Appeals found, as the District Court had, "that the Committee's need for the records outweighs the public interest in secrecy." (App. 53). As an additional factor favoring disclosure, the Court of Appeals also noted "the important 'public interest in the integrity and independence of the judiciary'" (App. 53). This Court has recognized that "the district court may weigh the public interest, if any, served by disclosure to a governmental body...." Illinois v. Abbott & Associates, Inc., supra, 103 S. Ct. at 1362 n.15.

In sum, the decision of the Court of Appeals rests on established judicial principles. The Court of Appeals

recognized the standards set by this Court for disclosure of grand jury materials and carefully applied those standards to the unique circumstances of this case. Its decision is not in conflict with the decisions of this Court, and, as previously noted, no other federal court has addressed the issue of disclosure to a special investigating committee created under the Act to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. §372(C)(5)(1982).

2. Question 2 and Reason 1(b), which assert grand jury abuse, are not fairly raised by the record. The Court of Appeals did not construe the Act to facilitate the Justice Department's improper use of the grand jury to assist the judicial councils, and there is no evidence or claim of grand jury abuse in this case.

In Question 2 and Reason 1(b) of the Petition for Writ of Certiorari,

Judge Hastings argues that the decision of the Court of Appeals will encourage prosecutors to misuse the grand jury to gather information against federal judges for use by judicial councils under the Act. He also claims that the Committee's investigation is in furtherance of an unconstitutional conspiracy against him.[6/]

The issue concerning misuse of the grand jury was neither raised nor decided below.[7/] Contrary to Judge

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[6/] This second claim apparently relates to Question 4 in the Petition for Writ of Certiorari. That question does not present a substantial issue for review by this Court.

[7/] This argument by Judge Hastings is based on a policy argument advanced by the Department of Justice in the Court of Appeals.

(Footnote continued)

Hastings' assertion, the Court of Appeals did not construe the Act to facilitate any improper use by the Justice Department to assist the judicial councils in conducting a proceeding under the Act. The Court of Appeals construed the Act as follows: "We infer not only from the Act's broad language but from its purpose a clear congressional intent that grand jury materials be among those available to a [special investigating]

(Footnote continued)

The Department noted that a grand jury investigation might on occasion develop evidence of possible misconduct by a federal judge for which indictment might not be appropriate. The Department urged that it be allowed to disclose such evidence to a judicial council. The Court of Appeals did not adopt or refer to this policy argument in its opinion.

committee in appropriate circumstances." (App. 36). The circumstances before the Court of Appeals involved grand jury materials already in existence, and no argument was even made that the prosecutors had improperly used this grand jury to gather information against Judge Hastings for use by the Committee or the Judicial Council of the Eleventh Circuit. Indeed, the fact that the grand jury investigation resulted in the indictment of two persons and the conviction of one clearly negates any suggestion that this grand jury was being used to assist the Committee. Abuse of the grand jury was simply not a factor presented to the lower courts. Reason 1(b) builds on nothing more than speculation and does not afford a basis for review by the Court of the decision below.

Judge Hastings' additional claim of an unconstitutional conspiracy was properly rejected by the Court of Appeals. That claim, which the Committee unequivocally denies, has no bearing on the disclosure issues presented to the District Court by the Committee's petition. The District Court sat as the court that had supervised the grand jury whose records were being sought. It did not sit to review the decisions or actions of the Committee or the Judicial Council of the Eleventh Circuit. Cf. Douglas Oil Co. v. Petrol Stops Northwest, supra, 411 U.S. at 224-31 (discussing the role of the supervising court). The Act precludes such review by a district court and provides that a judge aggrieved by any action of a judicial council may petition the Judicial

Conference of the United States for review of that action. 28 U.S.C. §372(c)(10)(1982). The Court of Appeals properly recognized this statutory scheme for review and ruled:

> Judge Hastings' charge that the Committee's investigation is part of a larger conspiracy is not a proper subject for consideration in this appeal. The investigation is being conducted pursuant to the Act and the district court was not the proper forum for addressing any underlying questions of constitutional abuse. Those concerns may be raised by Judge Hastings in a challenge to the actions, if any, taken by the Judicial Council.

(App. 54-55) (footnote omitted). The Court of Appeals was correct in the ruling.

3. Question 3 and Reason 2, which challenge the constitutionality of the Act, are not fairly raised by the record. Judge Hastings repeatedly advised the courts below that the constitutionality of the Act was not at issue in this case, and the lower courts did not decide that question.

In Question 3 and Reason 2 of the Petition for Writ of Certiorari, Judge

Hastings seeks to challenge the constitutionality of the Act under an allocation of powers theory. Although he adverted below to this constitutional question, he expressly withdrew the allocation of powers argument from consideration in this case. He repeatedly advised both the District Court and the Court of Appeals that he "does not suggest that these issues [as now presented in Question 3 and discussed in Reason 2] can or should be decided in these proceedings." Brief of Appellant in the Court of Appeals at 53 n.23. And, he makes the same statement to this Court in footnote 9 at page 38 of his Petition. In light of these statements, it is not surprising that the lower courts did not consider or decide questions relating to the

allocation of powers under the Act and the Constitution.

Furthermore, as noted in the Petition, Judge Hastings has filed a separate lawsuit challenging the constitutionality of the Act and presenting for decision the same arguments as are discussed in Reason 2. The suit was filed in the United States District Court for the District of Columbia on December 23, 1983 under the caption Hastings v. Judicial Conference of the United States, et al., Civil No. 83-3850. On July 25, 1984, Judge Gesell of the District Court issued a Memorandum upholding the constitutionality of the Act and expressly rejecting Judge Hastings' arguments on the allocation of powers under the Act and the Constitution. Judge Hastings noted an appeal from

this decision on August 23, 1984, and that appeal remains pending in the United States Court of Appeals for the District of Columbia.

This Court should not grant certiorari to decide the constitutionality of the Act. That issue was neither raised nor decided below.

4. Reason 3 has no validity. Once the Rule of Necessity is found to apply, the decision of the Court of Appeals is entitled to the same weight and respect as any other decision.

As his Reason 3 for granting certiorari, Judge Hastings argues that, because the Court of Appeals applied the Rule of Necessity to determine whether the panel members could decide the case, this Court should review the decision because only the members of this Court are unaffected by the operation of the Act. This argument proves too much.

If Judge Hastings were correct that review by this Court is required to assure impartiality of issues under the Act, then this Court would be compelled to pass on all issues arising under the Act, no matter how trivial or well-decided. The traditional considerations for issuing a writ of certiorari should not change merely because the lower courts applied the Rule of Necessity to determine a disqualification issue.

As the Court made clear in United States v. Will, 449 U.S. 200, 215 (1980), there is an "absolute duty of judges to hear and decide cases within their jurisdiction...." The Rule of Necessity permits a judge to fulfill that duty even where he might otherwise be disqualified because of interest if the alternative would be to

deny the litigants a forum. Id. at 217.

Judge Hastings claimed below that all district and circuit judges were disqualified from hearing this case because of interest in the outcome. He pointed to the judges' interest in the construction and implementation of the Act and argued that the Rule of Necessity did not apply. The Court of Appeals disagreed. Without deciding whether the asserted interest was truly disqualifying, the panel members of the Court of Appeals invoked the Rule of Necessity and declined to disqualify themselves (App. 17-18). Judge Hastings now concedes that the Rule of Necessity required that the panel members decide the issues presented on appeal (Pet. at 24).

Although the Court of Appeals applied the Rule of Necessity in response to Judge Hastings' argument below, the record does not clearly establish the need for that Rule. The interest of the presiding judges was indirect and remote at best. All were specially designated from outside the Eleventh Circuit, and no member of the panel is participating in any way in the proceedings involving Judge Hastings under the Act. Their interest is only in the precedential effect of this decision as members of the Judiciary who may at some future time become involved in a proceeding under the Act. Such an interest contrasts sharply with the type of direct financial interest of all federal judges that caused the Court to apply the

Rule of Necessity in United States v. Will, supra.

In all events, however, if the Rule of Necessity is to have any force, decisions rendered thereunder should be given the same weight and respect as any other decision. This is particularly true under the circumstances of this case where there is no suggestion of any actual lack of impartiality on the part of the judges below.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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0144Q

No. 84-302 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari To
The United States Court of Appeals
For the Eleventh Circuit

MOTION REQUESTING THAT THE COURT DEFER CONSIDERATION OF THE PETITION AND REQUEST THAT THE UNITED STATES RESPOND TO THE PETITION

LODGING

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APPENDIX TO MOTION 1a

1. Letter dated October 4, 1984, to Clerk, United States Court of Appeals for the Eleventh Circuit . . 1a

2. Order, Hastings v. Judicial Conference of the United States, et al., No. 84-5576 (D.C. Cir. filed Sept. 24, 1984) 6a

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No. 84-302

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

MOTION REQUESTING THAT THE COURT DEFER CONSIDERATION OF THE PETITION AND REQUEST THAT THE UNITED STATES RESPOND TO THE PETITION

Petitioner United States District Judge Alcee L. Hastings requests that the Court:

1. Defer action on his Petition for Writ of Certiorari (the "Petition") until the Court has received and reviewed

the record on which the decision below was based;[1]

2. Request that the Solicitor General file a response to the Petition setting forth the position of the United States and its Department of Justice; and

3. Either defer action on the Petition or, if the Petition is granted, defer briefing on the merits until the United States Court of Appeals has heard and decided a related case, The Honorable Alcee L. Hastings, United States District Judge v. Judicial Conference of the United States, et al., No. 84-5576 (D.C. Cir. docketed Aug. 24, 1984).

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1. By letter dated October 4, 1984, counsel for petitioner requested that the Clerk of the United States Court of Appeals for the Eleventh Circuit certify and transmit the record to this Court as soon as feasible and asked the Clerk of this Court to inform the Court that such a request had been made pursuant to Rule 19.1 of this Court's Rules. A copy of that letter is included in the Appendix to Motion, infra.

STATEMENT OF THE CASE

1. The Nature of the Action

Petitioner is a United States district judge. His conduct was investigated by a federal grand jury. The grand jury returned an indictment charging that petitioner had conspired to corrupt and obstruct justice. Petitioner was tried and acquitted. Shortly thereafter, two members of the judicial council of the circuit in which petitioner serves filed a complaint under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604 (1982). The complaint realleged the charges on which petitioner had been tried and acquitted and asked the judicial council to reinvestigate the charges and recommend that petitioner be impeached by the House of Representatives.

The Respondent Investigating Committee (the "Committee") was appointed to investigate the allegations in the complaint. As one of the first steps in its investigation, the Committee filed a petition asking the district court to permit the Committee's representatives to inspect and copy all records of the grand jury that had indicted petitioner. The Justice Department supported the petition; petitioner here opposed it. The other judges serving in petitioner's district disqualified themselves, and a judge from outside the circuit was designated to preside.

The district court determined that it would be inappropriate for the court to examine any of the requested grand jury materials prior to disclosure to determine which, if any, were relevant and necessary to the Committee's investigation or to

resolve the factual issues raised by petitioner's affirmative defenses. After considering briefs and hearing oral argument, the district court entered an order directing the United States Attorney for the district to "procure and disclose to the Special Committee [respondent here] and its two designated counsel all records, transcripts, minutes, and exhibits of Grand Jury 81-1-GJ (MIA)" (App. 99-100; emphasis supplied). The court imposed restrictions on the time, place, and manner in which the inspection and any copying were to be done (App. 100-05). The court did not, however, restrict or limit in any way the records to which the Committee was to have access (id.). After hearing the appeal, a panel of specially designated judges affirmed the district court's order (App. 1-57).

2. Facts and Proceedings Relevant to this Motion.

a. The court of appeals denied the petition for rehearing on August 3, 1984 (App. 106-07). Petitioner here promptly asked that court to stay its mandate to permit him to seek review in this Court. As required by local rule,[2] that motion identified substantial questions that he intended to present to this Court. The respondent Committee filed a brief in opposition to that motion. The court of appeals, by the presiding member of the special panel and author of the opinion below, granted the motion on August 13th (App. 108-09).

In accord with the condition imposed by that order, counsel for petitioner filed the Petition on August 25, 1984.

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2. Rule 27 of the Rules of the United States Court of Appeals for the Eleventh Circuit.

On August 30th, the Committee filed an Application for Order Vacating Stay addressed to Justice Powell as Circuit Justice for the Eleventh Circuit. The Committee acknowledged that the decision below presented a question of first impression concerning proceedings of vital importance to the Judiciary. The Committee simply alleged that the Court was unlikely to grant review or to reverse the decision below and urged that the stay be vacated. Justice Powell promptly denied the Application. Investigating Committee of the Judicial Council of the Eleventh Circuit v. The Honorable Alcee L. Hastings, No. A-144 (84-302)(Sept. 6, 1984). Five days later, the Solicitor General advised the Court that the United States did not intend to file a response to the Petition "unless requested to do so by the Court."

b. On October 2, 1984, petitioner received the forty-eight (48) page Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit in Opposition to Petition for Writ of Certiorari (the "Brief"). In the Brief, counsel for the Committee alleged that two of the four Questions Presented in the Petition "are not fairly raised by the record" (Brief at i-ii). Throughout the Brief, counsel for the Committee also suggested that petitioner had taken positions in the Petition inconsistent with the arguments he had made in the courts below (e.g., Brief at 35-36, 40-42, 45).

The Committee's Brief has created serious factual questions and has called counsels' integrity as members of the Bar of this Court into question. Accordingly, counsel for petitioner promptly invoked Rule 19.1 of the Rules of this Court and

requested that the clerk of the court of appeals certify and transmit to the Court the record upon which the courts below based their decisions in order that this Court would have that record available to it before it acted upon the Petition (App. to Mot., infra).

c. In December, 1983, Petitioner here filed a complaint in the United States District Court for the District of Columbia challenging the constitutionality of the Act on its face and as it had been applied in proceedings against him. The Honorable Alcee L. Hastings v. Judicial Conference of the United States, et al., No. 83-3850 (slip op. July 25, 1984). The members of the respondent Committee are defendants in that action. On July 25th, the district court entered a decision holding the Act facially valid and finding that the federal courts were precluded

from considering petitioner's other claims (id.).

Judge Hastings duly noted his appeal. The Honorable Alcee L. Hastings v. Judicial Conference of the United States, et al., No. 84-5776 (D.C. Cir. appeal docketed Aug. 24, 1984). That court has now established a briefing schedule and instructed its clerk to include the case in the pool of cases that are available for selection on its February, 1985 calendar. (A copy of that court's order is included in the Appendix to this Motion.)

REASONS WHY THE MOTION SHOULD BE GRANTED

1. The Court Should Defer Consideration Of The Petition Until The Record Is Available For Its Review.

In its Brief, counsel for the Committee alleges that two of petitioner's four Questions Presented "are not fairly raised

by the record" (Brief at i-ii) and suggests throughout that counsel for petitioner has been less than candid with the Court (e.g., Brief at 35-36, 40-42, 45). In Petitioner's Reply to the Brief (the "Reply"), counsel for petitioner will respond with appropriate citation to the record below.[3] Nonetheless, the pleadings before this Court raise serious factual questions. In fairness the Court should not have to resolve these questions based solely upon the assertions of counsel for the parties.

This Court's Rule 19.1 permits any party to request that the record be certified and transmitted to the Court at any time prior to action on a petition for writ of certiorari. Counsel for peti-

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3. Counsel has prepared Petitioner's Reply to the Brief. It will be filed with this motion if the printing can be completed. Otherwise, it will be filed as soon thereafter as possible.

tioner submits this is one of those fortunately rare instances when the record may properly be deemed essential to enable the Court to verify the assertions in the Petition and the Reply and to resolve the factual questions raised by the Brief. To make this procedure meaningful, the Court should defer action on the Petition until the record has been received and made available to the Court.

2. The Court Should Request That The Solicitor General File A Response To The Petition And Should Defer Action Until That Response Has Been Received.

Attorneys in the Criminal Division of the United States Department of Justice (and prosecuting attorneys in the offices of the various United States Attorneys) occupy a special position with respect to grand jury materials. The grand jury provides these attorneys with powerful tools to assist them in executing their

responsibilities in investigating and preparing cases for prosecution under the criminal laws of the United States. Once the investigative and prosecutorial functions have been completed, however, those same attorneys retain a custodial responsibility as officers of the district court under whose auspices the grand jury was convened. They assume a fiduciary duty to assure that the courts with ultimate responsibility for maintaining the integrity of the grand jury are fully and properly informed in cases in which a stranger to the grand jury seeks access to the products of its work for use in civil proceedings.

In the present case, the prosecuting attorneys publicly asserted that the grand jury records included some materials relevant to the Committee's investigation, but supported the Committee's position

that independent examination by the district court to verify this assertion or to limit disclosure to the specific materials found relevant was inappropriate. Those same attorneys reported that the Criminal Division's Public Integrity Section has used federal grand juries to investigate other federal judges. They urged the court of appeals to uphold the district court's construction of the Act to assure that they would be able to disclose the products of grand jury investigations into the conduct of other federal judges to the appropriate circuit judicial council or special committee appointed pursuant to the Act.

This Court has recently reiterated its concern that disclosure of grand jury material for non-criminal use presents the potential for encouraging prosecutorial misuse of the grand jury's powers.

United States v. Sells Engineering, Inc., 103 S.Ct. 3133, 3142-43 (1983). Given that concern, the sensitive issues surrounding the Executive's use of the grand jury to investigate the conduct of the very judges before whom it appears, and the total disclosure the Justice Department urged in the courts below, the Solicitor General's decision not to respond is startling. By its Brief, the Committee suggested that petitioner may have mischaracterized the Justice Department's position and the potential consequences of the court of appeals's decision on the Public Integrity Section's investigation of sitting federal judges. In those circumstances, petitioner submits that this Court should not act upon the Petition without first requesting and receiving a full statement of the position of the United States Department of Justice.

3. The Court Should Either Defer Action On The Petition Or Grant The Petition And Defer Briefing On The Merits Until The United States Court of Appeals For The District of Columbia Circuit Has Heard And Decided Judge Hastings's Challenge To The Constitutionality Of The Act.

a. In the courts below, Judge Hastings urged that the doctrine of constitutional avoidance compelled a construction of the Act that should have resulted in the Committee's petition being dismissed or denied. The third Question Presented in the Petition (Petition at ii) brings that issue before this Court. For reasons articulated more fully in petitioner's Reply, petitioner submits that the Committee's attempt to characterize that issue as a challenge to the Act's constitutionality is disingenuous at best.

In a separate action, to which the members of the Committee are party and in which they are represented by the same

counsel, Judge Hastings directly challenged the constitutionality of the Act on its face and as it had been construed and applied in proceedings against him, including the construction initially given by the district court and later affirmed by the court of appeals in the proceedings seeking disclosure of grand jury material. The district court in the related action rejected the challenge to the Act's facial validity and ruled that the Act precluded the court from exercising jurisdiction to consider any claim that it was being construed and applied in an unconstitutional manner. Hastings v. Judicial Conference of the United States, No. 83-3850 (D.D.C. July 25, 1984) (slip. op.), appeal pending, No. 84-5576 (D.C. Cir.).

Petitioner's appeal from that decision is now pending before the Court of

Appeals for the District of Columbia Circuit. That court has established a briefing schedule and has instructed its clerk to place the case in the pool available for selection in Feburary, 1985 (App. to Mot., infra). It is reasonable to assume that that court will decide the case promptly and that any party aggrieved by that decision will seek to have it reviewed in this Court.[4]

b. The importance to the federal judiciary of the underlying questions and the efficient allocation of judicial resources suggest that the questions that will be presented by any appeal or petition seeking review in Hastings v. Judicial Conference should also be before this Court as it considers the Questions Presented by the Petition here. In both

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4. Indeed, a decision by this Court to defer action in this case may well expedite a decision by the court of appeals.

cases, all parties have acknowledged that the Act is a substantial political innovation that will have a far reaching and substantial impact on the federal judiciary. Whether it is constitutional and, if so, how it should be construed and implemented are critical questions that will affect the operations of all three branches of government.

Logically, the underlying questions concerning the facial validity of the Act and the manner in which it has been construed and applied in proceedings against petitioner here should be addressed by this Court with the Questions Presented here. If the Act survives such an examination, the specific questions concerning its proper construction and implementation in relation to the Executive's use of grand juries to investigate federal judges could be considered and

resolved against that background. If either the Act or the proceedings against Judge Hastings were found to be unconstitutional, a decision in this case would be unnecessary.

c. The delay that would result if this Court deferred action in this case would not significantly affect the implementation of the Act or the administration of the business of the courts in the Eleventh Circuit. The complaint that the Committee is investigating alleges that Judge Hastings committed a high crime in office. Only the House of Representatives may initiate proceedings to effectively sanction that conduct, and that body need neither await nor defer to any investigations or recommendations from administrative bodies of the Judiciary. Moreover, given the notoriety that has attended the prosecution, trial, and subsequent pro-

ceedings against Judge Hastings, it is difficult to perceive how any decision that the Judicial Council of the Eleventh Circuit might make could meaningfully alter the public perceptions of the controversy and its participants or affect the business of the courts in that circuit.

In short, there are sound and substantial reasons why the Court should defer action in this case until the related case is also before it. The reasons for early action, on the other hand, are few and relatively unsubstantial.

CONCLUSION

This nation has enjoyed the benefits of an independent federal court system for almost 200 years. That system has depended in significant measure upon the judicial individualism promoted by the

constitutional protections afforded the individual judge and by the historic self-discipline of the courts in refraining from assuming unnecessary non-judicial powers and functions. It may be that a substantial change is necessary, but that determination is of sufficient importance that it should not be rushed, certainly when there is no apparent need for haste.

Accordingly, Petitioner United States District Judge Alcee L. Hastings requests that the Court:

1. Defer action on the Petition until the Court has received and reviewed the record on which the decision below was based;

2. Request that the Solicitor General file a response to the Petition setting forth the position of the United States and its Department of Justice; and

3. Either defer action on the

Petition or, if the Petition is granted, defer briefing on the merits until the United States Court of Appeals has heard and decided The Honorable Alcee L. Hastings, United States District Judge v. Judicial Conference of the United States, et al.

Respectfully submitted,

Terence J. Anderson
c/o University of Miami
School of Law
P. O. Box 248087
Coral Gables, Florida 33124
(305) 284-2971

Counsel of record for the
Honorable Alcee L. Hastings,
petitioner.

APPENDIX TO MOTION

October 4, 1984

Express Mail

Spencer D. Mercer, Clerk
United States Court of Appeals
for the Eleventh Circuit
United States Court of Appeals
Courthouse
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Hastings v. Investigating Committee, No. 84-302 (U.S.): Request that Record in In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003 (11th Cir.), be Certified and Transmitted to the Supreme Court of the United States Pursuant to that Court's Rule 19.1.

Dear Mr. Mercer:

On August 25, 1984, I filed a Petition for Writ of Certiorari (the "Petition") on behalf of the Honorable Alcee L. Hastings asking the Supreme Court of the United States to review the decision of the Court of Appeals in In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003 (11th Cir.). The Petition was docketed in the Supreme

Court as Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit, No. 84-302 (U.S.).

On October 2, 1984, I received a copy of the Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit in Opposition to Petition for Writ of Certiorari (the "Brief"). In that Brief, counsel for the Committee asserts that two of the four Questions Presented in the Petition "are not fairly raised by the record" [Brief, pp. (i)-(ii)]. That assertion calls into question my integrity as a member of the Bar of the Supreme Court. Moreover by that assertion and throughout the Brief, the Committee implies that counsel for petitioner has been less than candid with the court and may have misstated the case below. Petitioner believes and will suggest in his Reply that the Committee seriously

misread the Questions Presented in the Petition and that its Statement of the Case and Argument based upon that misreading are misleading.

The Committee's Brief has created a serious factual question that the Supreme Court can only resolve by a direct examination of the record that the Court of Appeals had before it when it decided the case. For that reason as counsel to petitioner, I now deem it essential that the Supreme Court have the complete record before it prior to the time that it acts upon the Petition.

The mandate of the Court of Appeals has been stayed pending disposition of the Petition, and I am advised that the Court of Appeals remains in possession of the record. Accordingly, as counsel for the Honorable Alcee L. Hastings, petitioner, and pursuant to Rule 19.1 of the Rules of

the Supreme Court of the United States, I hereby request that you certify the record in In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003, including both the record on appeal as transmitted to the Court of Appeals by the United States District for the Southern District of Florida and the record made in the Court of Appeals by the parties' briefs and that court's orders, and that you transmit this record to the Supreme Court of the United States. Because the Committee's Brief has been filed and the Solicitor General has advised the Supreme Court that the United States does not intend to respond, I would ask that you certify and transmit this record at the earliest possible date.

By copy of this letter, I am asking the Clerk of the Supreme Court to inform the Court that petitioner has requested

that the record be made available to the Court before action is taken on the Petition. I am also sending a copy of this request to John Doar, Esq., counsel of record for the Committee, and to the Honorable Rex E. Lee, Solicitor General and counsel of record for the other respondent, the United States of America.

Sincerely,

Terence J. Anderson
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, Florida 33124
Counsel for the record for the
Honorable Alcee L. Hastings.

copies to:

Alexander Stevas, Clerk
Supreme Court of the United States

John Doar, Esq.

The Honorable Rex E. Lee
Solicitor General of United States

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 84-5576

September Term, 1984
DC Civil No. 83-03850
DC Crim. NO. _____

Honorable Alcee L.Hastings,
U.S. District Judge,
Appellant

v.

Judicial Conference of the
United States, et al.

O R D E R

This matter having been docketed on August 24, 1984 and the docketing statement having been filed, it is

ORDERED that a briefing schedule is set as follows:

Appellant(s) brief and appendix (or record excerpts or General Rule 17(c) transcripts) November 13, 1984,

Appellee(s) brief December 13, 1984,

Appellant(s) reply brief, if any December 17, 1984.

Based upon the foregoing brief schedule, the clerk shall include this

case in the pool of cases that are available for selection on this Court's February, 1985 calendar.

For the Court:

GEORGE A. FISHER, Clerk

By: /s/ [not legible]
Deputy Clerk

No. 84-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

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PETITIONER'S REPLY TO BRIEF OF RESPONDENT INVESTIGATING COMMITTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TERENCE J. ANDERSON

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Counsel of record for the Honorable Alcee L. Hastings Petitioner.

LODGING

Filed with Petititon for Rehearing on October 16, 1984
(Originally prepared for filing on October 11, 1984)

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No. 84-302

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT INVESTIGATING COMMITTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner United States District Judge Alcee L. Hastings submits that the respondent Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee") has mischaracterized the Questions Presented in the Petition for Writ of Certiorari (the

"Petition") and the contentions made in and necessarily decided by the courts below. As a result, the Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit in Opposition to Petition for Writ of Certiorari (the "Brief") fails to address adequately the true issues this case raises or the underlying reasons why this Court should grant the writ. Moveover, the Brief employs those mischaracterizations in a manner calculated to mislead the Court.

1. The decision ordering disclosure of all the records of a grand jury for use in a civil administrative investigation is unprecedented in the decisions of this or any inferior federal court and presents a clear conflict with the principles that this Court has applied in each of the grand jury disclosure cases it has decided.

a. In the courts below, the Committee sought (App. 110-16) and obtained (App. 99-100) unprecedented access to

grand jury materials. A district judge unfamiliar with the grand jury's proceedings and records or with the Committee's investigation affirmatively declined to examine either and ordered the custodian of those records to "procure and disclose to the Special Committee all records, transcripts, minutes, and exhibits of Grand Jury 81-1-GJ(MIA)" (App. 99-100). The only restrictions imposed upon the Committee's access went to the time, manner, and place at which the disclosure was to be made and copies taken (App. 99-105). Both courts recognized that they were dealing with a case of first impression and vital importance to the federal judiciary (App. 1-98, 108-09).[1]

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1. Against that background, it is significant that counsel for the judges seeking access to the grand jury material found it necessary to file a forty-eight (48) page brief to persuade this Court that the case was not worthy of review while the Solicitor General as counsel for the custodians of the grand jury records [Footnote continued.]

b. In its Brief, the Committee simply argues the merits of its position that the special nature of its statutory mandate and the status of its members as federal judges override the principles established to protect the integrity of the grand jury and require that a special exception be created for judicial investigations (Brief at 19-35). The fact that these arguments prevailed in the court of appeals or that they might ultimately persuade this Court does not undercut the importance of the Questions Presented or the need for review by this Court; it only emphasizes them.

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1. (Continued)
of all federal district courts declined to advise the Court of the Executive Branch's views on the Questions Presented. That anomaly simply reinforces the conclusion that review by the only Court whose members cannot be affected by the outcome is necessary and appropriate.

The decision below is unprecedented in the truest sense of that word. No party to this case has identified here or in the courts below any decision of any federal court that has ordered or approved either (a) disclosure of all records of an entire grand jury proceeding for use in non-criminal proceedings, or (b) disclosure of any grand jury records for non-criminal use in which the judge or judges ordering disclosure had not independently determined that disclosure of the specific materials was necessary. The decisions below ordered and approved both.

The lack of precedent to support the court of appeals decision is not an accident. The decision below conflicts with the decisional jurisprudence this Court articulated and applied in each its decisions in civil grand jury disclosure cases. See Petition at 25-33.

c. The Committee's contention that petitioner's argument on the merits was limited in the courts below or would be limited in this Court to an argument "that Rule 6(e) provides the exclusive framework for disclosure of grand jury materials" (Brief at 11; see also id. at 22) constitutes a further mischaracterization of the record below.

The district court initially ruled that the Committee's petition was subject to the requirements of Rule 6(e)(3)(C)(i),[2] and petitioner's opening briefs were based upon that ruling.[3] The subsequently

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2. Order for Briefing, In re Petition to Inspect and Copy Grand Jury Materials, No. 81-1-GJ (MIA) (S.D. Fla. filed Aug. 11, 1983)(Atkins, Sr. J.). Because a special panel was designated to hear the appeal, the paginated record was not circulated to counsel. For that reason, citations to the record below identify documents by party, document title, and date.

3. Hastings, Memorandum in Support of Motion to Dismiss or for Judgment on the [Footnote Continued]

designated judge invited the parties to resubmit comprehensive briefs in order that he "might be fully advised of your contentions as to the facts and the law."[4] In response to that invitation, the Committee renewed its argument that the district court had and should exercise inherent authority to order the requested disclosure.[5] Thereafter, Judge Hastings fully developed the arguments showing that

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3. (Continued)
Pleadings and in Response to Motion to Confirm Status and for Briefing (filed Aug. 22, 1983) and United States District Judge Alcee L. Hastings's Memorandum in Response to Court's Letter Order Dated September 23, 1983 ["Hastings Mem. (S.D. Fla.)"] (filed Oct. 14, 1983), In re Petition (S.D. Fla.).

4. Letter Order, In re Petition (S.D. Fla., dated Sept. 23, 1983) (Gordon, Sr. J., by designation).

5. Memorandum of the Investigating Committee of the Judicial Council of the Eleventh Circuit in Support of Its Petition to Inspect and Copy Grand Jury Materials ["Committee Mem. (S.D. Fla.)"] In re Petition (S.D. Fla. dated Oct. 13, 1983).

the inferior federal courts had never approved an exercise of inherent authority to order disclosure of the entire record of a grand jury investigation or, indeed, to order disclosure of any grand jury material that had not been independently examined by the court approving disclosure.[6]

2. The decisions below clearly and necessarily create a potential for grand jury misuse that would be difficult to detect and impossible to prove and that is properly raised by the record below.

Contrary to the Committee's assertions (Brief at i-ii, 35-36), the second Question Presented in the Petition does not raise an issue of grand jury misuse in

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6. Judge Hastings's Reply ["Hastings Reply (S.D. Fla.)"], 1-17, In re Petition (S.D. Fla., dated Oct. 24, 1983); Brief for Appellant: The Honorable Alcee L. Hastings ["Appellant's Brief (11th Cir.)"], e.g., at 28-32, In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003 (11th Cir. dated Feb. 27, 1984).

fact; it poses the issue of potential grand jury misuse. That question was argued in and necessarily decided by the courts below and is properly raised here.

a. This Court most recently identified and discussed the distinction in United States v. Sells Engineering, Inc., 103 S.Ct. 3133.

> . . . [B]ecause the government takes an active part in the activities of the grand jury, disclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper per se.*** Our concern is based less on any

> belief that grand jury misuse is in fact widespread than on our concern that, if and when it does occur, it would often be very difficult to detect and prove. Moreover, as the legislative history . . . shows, our concern over possible misappropriation of the grand jury itself was shared by Congress when it enacted the present version of Rule 6(e). Such a potential for misuse should not be allowed absent a clear mandate in the law.

Id. at 3142; citations omitted. The case before this Court presents the same potential for misuse; only the types of governmental actors are different.

b. Throughout the proceedings in the courts below, the Committee recognized the issue and addressed it, arguing that the status of the Committee's members as article III judges made the concern inapplicable to them.[7] Throughout the

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7. See, e.g., Committee Mem. (S.D. Fla.), supra n.5, at 12-15; Brief of Petitioner-Appellee Investigating Committee of the Judicial Council of the Eleventh Circuit at 1-2, 25, 31-32, In re Petition (11th Cir.).

proceedings in the courts below, the prosecuting attorneys representing the Justice Department in its custodial capacity agreed with the Committee, and argued that the Act ought to be construed to facilitate the transmission of the products of grand jury investigations into allegations of misconduct by a federal judge to the appropriate judicial council.[8] Throughout the proceedings in the courts below, Judge Hastings relied upon this Court's analysis and argued that the potential for abuse identified and discussed in Sells was present here.[9] The courts below made their decisions with these contentions before them.

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8. See Petition 12-13, nn.3-5 (for appropriate citations to the record below).

9. See, e.g., Judge Hastings's Reply (S.D. Fla.), supra n.6; Appellants Brief (11th Cir.), supra n.6, at 15-32; Reply Brief for Appellant: The Honorable Alcee L. Hastings, In re Petition (11th Cir. dated Mar. 16, 1984).

c. With these contentions before them, the courts below decided that if a special committee shows that the conduct of a federal judge that it is investigating in administrative proceedings has a close nexus to conduct already investigated by a federal grand jury, then the district court may (and presumably must) order disclosure of all the grand jury materials (i) without any prior or independent examination of the materials to be disclosed or inquiry into the administrative investigation being conducted and (ii) without affording the object of both investigations any opportunity to challenge the special committee's motives in seeking the material. That decision raises the second Question Presented clearly, fairly, and unavoidably, and respondents should not now be heard to suggest otherwise.

3. Throughout the proceedings below, petitioner argued that the courts should apply the doctrine of constitutional avoidance in construing the Act; the record and the decision of the court of appeals raise the third Question Presented.

a. The Committee's Brief is totally accurate in one claim: All parties and both courts below agreed that the constitutionality of the Act itself had not been challenged in this case and was not before the courts for decision (Brief at 41-42). The Committee is totally inaccurate in another (Brief at i-ii, 40-41): Petitioner did argue in the courts below, and properly raises here, the question whether the doctrine of constitutional avoidance requires that the Act be construed in a manner that would require that the Committee's petition be dismissed or denied.[10]

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10. See, e.g., Hastings Mem. (S.D. Fla.), supra n.5, at 32-37; Brief of Appellant (11th Cir.), supra n.6, at 32-55. The question as posed for the court of appeals was:
[Footnote continued]

That is the third Question Presented, and that question is fairly raised on the record.

b. The doctrine of constitutional avoidance in the decisions of this Court has an ancient lineage [see, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 441 (1821)]; a classic formulation [Ashwander v. TVA, 297 U.S. 288, 346-48 (1935) (Brandeis, J., dissenting)]; and contemporary application [see, e.g., NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)]. Petitioner clearly invoked that doctrine in the courts below. The Commit-

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10. [Continued]
Did the district court err in failing to recognize, and to construe the Act to minimize, the potential conflict between the Act and the provisions of the Constitution designed to keep separate the powers of government and to guarantee the independence of each federal judge?

Appellant's Brief (11th Cir.), supra n.6, at 2.

tee's attempt to mischaracterize the issue (Brief at i-ii, 40-41) is disingenuous at best.[11]

4. The arguments advanced and the characterizations made by the Committee in its Brief further evidence the need for this Court to review and resolve a dispute that has pitted federal judge against federal judge before federal judge and that concerns the powers and privilege of all federal judges other than the Justices of this Court.

a. In its Brief, the Committee confuses the distinction between reasons why this Court should grant review and arguments going to the merits of how the Court should decide the issues once review

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11. Indeed the Committee relied upon petitioner's formulation of the question in the court of appeals in attempting to persuade the district court in Hastings v. Judicial Conference, No. 83-32850 (D.D.C.) that the decisions of the courts below in this case affected the claims petitioner asserted there. Petitioner submits that more than mere disingenuity is afoot here. See, e.g., Reply to Plaintiff's Opposition to Defendants Motion for Judgment on the Pleadings at 19, Hastings v. Judicial Conference, No. 38-3850 (D.D.C.).

has been granted (Brief at 43-48). In the courts below, petitioner argued the merits below claiming in sum:

> The manner in which the Act is construed and implemented might, nay will, affect the interests of every district and circuit judge. For some, it may present a threat; for others, it may create enhanced powers. But for each, it will have an effect upon the rights he or she holds incident to the judicial office. Here, for example, this appeal asks this court to determine whether and under what circumstances a special committee investigating a federal judge may have access to the records of a grand jury. The judges who decide that question will be deciding how the Act would apply to himself as well as to Judge Hastings. More importantly, the judges of the panel here are being asked to decide in a judicial capacity what administrative powers they hold as members of a circuit judicial council. Thus, unless the doctrine of necessity applies ([United States v.] Will, 449 U.S. 200, 217 [1980]), 28 U.S.C. § 455 [1982] mandates that the federal courts decline jurisdiction.

and reasoned from that simple predicate that:

> Clearly the doctrine of necessity did not apply because the statute could and should have been construed to deny subject matter jurisdiction and make a decision on the merits unnecessary. The district court should have so construed the Act on this ground alone.

Brief of Appellant: The Honorable Alcee L. Hastings at 54-55, In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir. 1984).

In the Petition the predicate was the same: the fact that the decision below was made in a controversy between federal judges before federal judges concerning the application of the Act to federal judges created a disqualifying interest for the federal judges before whom the case came (Petition at 41). The doctrine of necessity compelled the judges of those courts to rule upon the jurisdictional question and, having found jurisdiction, to proceed to the merits.

The decisions of those courts were necessary to enable the parties to invoke this Court's appellate jurisdiction. 28 U.S.C. § 1254(1)(1982). The foundation for that jurisdiction has been laid.

The fact that Act does not apply to the Justices of this Court leaves one and only one forum composed of federal judges not subject to a disqualifying interest. The issues raised affect the judges of all the federal courts over which this Court exercises its power of supervision [see, e.g., Rule 17.1(a) of this Court's Rules]. This is a case of first impression that will affect the interests of the entire federal judiciary. Those were the reasons petitioner advanced (Petition 40-44), and the Committee has declined to address them. Petitioner submits that they were and remain compelling.

b. The Committee's suggestion that, carried to their logical extreme, petitioner's arguments would require this Court to grant review in all cases between federal judges arising under the Act ignores reality. This case and Hastings v. Judicial Conference are the only cases arising under the Act that have come before the federal courts. Resolution of the issues presented here and there will finally resolve the fundamental questions that Act presents -- if, but only if, this Court resolves them. Those decisions will either make further litigation between judges unnecessary or will provide the guidance and framework necessary to permit such litigation to be conducted in an orderly and expeditious manner. Given the acrimony and notoriety this litigation has generated, that is a result this Court

should seek to achieve at the earliest feasible moment.

CONCLUSION

Petitioner has separately requested that this Court defer action on the Petition.[12] Petitioner submits, however, that when this Court does act, it should grant the Petition and issue the writ.

Respectfully submitted,

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12. See Motion Requesting that The Court Defer Consideration of the Petition and Request that the United States Respond to the Petition, Hastings v. Investigating Committee, etc., et al., No. 84-302 (U.S.).

No. 84-302

(5)

Supreme Court, U.S.
FILED
OCT 17 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

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PETITION FOR REHEARING

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OCTOBER 16, 1984

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No. 84-302

In
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR REHEARING

Petitioner asks that this Court vacate its order denying his Petition for Writ of Certiorari (the "Petition"). The Office of the Clerk of this Court erroneously distributed the Petition to the Court two weeks before the time for filing a brief in opposition had expired. As a result the Court acted upon the Petition prematurely and only

one week after a forty-eight page Brief in Opposition[1] had been filed and distributed to the Court. That error deprived petitioner of any opportunity to respond to matters first raised in the Brief in Opposition.

With this Petition for Rehearing, counsel for petitioner has submitted the Motion[2] and the Reply[3] that he had prepared and that would have been before the Court when it considered the Petition had the Rules and normal practices of this Court been followed. The Motion and the Reply set forth matters that the Court should have considered before it acted on the Petition. Moreover,

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1 Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit in Opposition to Petition for Writ of Certiorari.

2 Motion Requesting that the Court Defer Consideration of the Petition and Request that the United States Respond to the Petition (the "Motion").

3 Petitioner's Reply to Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit ini Opposition to Petition for Writ of Certiorari (the "Reply").

petitioner submits that the Court should not permit an inadvertent departure from its normal practices to create an impression in this case that a petitioning federal judge seeking relief from actions that his more senior judicial colleagues initiated did not receive the same consideration that this Court routinely gives other litigants who petition it for relief. Accordingly, petitioner submits that this Court should now vacate its premature order and reconsider the Petition with the Motion and the Reply before it.

1. Statement of Facts Justifying Rehearing.

The Petition was filed in this Court on Saturday, August 25, 1984, and served on counsel for the respondents by mail. The Petition named two respondents. The first, the Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee"), was the party who had petitioned

for access to the grand jury materials below. The second, the United States of America, had responded in the proceedings below, through the Criminal Division of its Justice Department, as the custodian of the grand jury materials. Each respondent had its own counsel below.[4]

On Tuesday, September 11, the Solicitor General filed a Waiver advising the Court that the "government" would not file a response to the Petition unless requested to do so. The Clerk's office has since informed counsel for petitioner that that Office misperceived the scope of that waiver and distributed the Petition to the Court on Wednesday, September 12, and placed it on the list of cases to be acted upon at the Court's

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[4] It became clear that each would be separately represented in this Court on August 30, 1984. On that day counsel for the Committee filed an Application for Order Vacating Stay addressed to Justice Powell as Circuit Justice for the Eleventh Circuit. Justice Powell denied that Application on September 6, and the Clerk so advised counsel for each of the parties.

conference three Fridays later, on October 5, 1984.

It was not until Thursday, September 27, that the Committee filed its forty-eight (48) page Brief in Opposition.[5] That brief accused counsel for petitioner of presenting questions that were not "fairly raised by the record" (Br. Opp. at i-ii) and used that characterization in arguing that the Petition should be denied (id. at 35-43).

Petitioner received his copy of the Committee's Brief in Opposition on October 2, 1984[6] and immediately determined that a response was necessary. On October 4, he sent

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[5] The Clerk's office reported that the Brief in Opposition was promptly distributed to the Court.

[6] Counsel for petitioner does not suggest that the delay in receipt was attributable to any defect in service by the Committee. He is not aware of the method of service employed, but he has experienced internal delays attributable to the University's mail distribution system. He reports the fact only to emphasize the types of problems that must arise if the Court's rules and normal practices governing the distribution of certiorari petitions are not strictly observed.

a letter by Federal Express to the clerk of the court of appeals asking that the record below be certified and transmitted to this Court pursuant to Rule 19.1. By copy of that letter, he asked the Clerk of this Court to advise the Court that that request had been made.[7] Counsel promptly drafted the Motion and the Reply that now accompany this Petition for Rehearing.

On Tuesday, October 9, counsel for petitioner learned that this Court had entered an order denying the Petition. That afternoon, in response to counsel's inquiries, the Clerk's staff informed him that the Petition had been distributed to the Court on the day after the Solicitor General had filed the government's waiver and simultaneously had been placed on that list of cases to be acted upon at the Court's conference three Fridays later, on October 5.

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[7] A copy of that letter is included in an Apendix to the Motion (App. to Mot. at 1a-5a).

The next day, October 10, 1984, counsel for petitioner dispatched by Federal Express an Application to Suspend Order Denying Petition for Writ of Certiorari Pending the Filing and Disposition of a Petition for Rehearing addressed to Justice Powell as Circuit Justice for the Eleventh Circuit. Copies of the draft Motion and Reply were appended to that Application. Petitioner now submits this Petition for Rehearing accompanied by the Motion and the Reply.

2. Reasons why Rehearing Should be Granted.

a. The normal practices and procedures for handling petitions for writ of certiorari are prescribed by the Court's Rules. Rule 22 provides in relevant part:

> 1. Respondent shall have 30 days . . . after receipt of a petition, within which to file . . . an opposing brief . . . .
>
> * * *
>
> 4. Upon the filing of a brief in opposition, or the expiration of the time allowed therefore, or express waiver of the right to

> file, the petition and brief, if any, will be distributed by the Clerk to the Court for its consideration . . . .
>
> 5. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner but distribution under paragraph 4 will not be delayed pending the filing of any such brief.

Rule 22, Rules of the Supreme Court of the United States (emphasis added).

The Petition in this case was distributed at least two weeks before the Committee's time to file a brief in opposition had expired and more than two weeks before the Committee's Brief in Opposition was in fact filed.[8] The premature distribution caused the Petition to be scheduled for

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[8] As a courtesy, counsel for petitioner served the Petition on counsel for the Committee by express mail, anticipating that he might seek to have the stay vacated. The Petition was served upon the Solicitor General by first class mail, and counsel for petitioner does not know by what date the Petition had been received by both counsel for the Committee and the Solicitor General's office as required by Rule 28.4(a) of this Court's Rules.

consideration and action by the Court at least two weeks before it should have begun under the Court's normal practices.[9] As a

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[9] As counsel understands the normal practice, the Clerk's office determines which petitions are ready for distribution pursuant to Rule 22.4 every Tuesday and distributes the appropriate petitions and briefs in opposition to the Court each Wednesday morning. At the time of distribution, the Clerk's office schedules the petitions so distributed for consideration and disposition at the Court's regular Friday conference sixteen or twenty-three days later.

The Brief in Opposition here was filed on Thursday, September 27. Under the practice as counsel understands it, the Petition and Brief in Opposition would normally have been included in the distribution made on Wednesday, October 3, and scheduled for consideration on Friday, October 19 or 26.

In reviewing petitioner's Application to Justice Powell, one of the deputy clerks suggested that, since 30 days from the date of filing had expired by Tuesday, September 25, the Petition might have been distributed on Wednesday, September 25, and scheduled for conference as early as Friday, October 12, even in the absence of an express waiver by the Committee. That suggestion is inconsistent with Rules 22.1 and 28.4(a) defining the time for filing a brief in opposition and, to the extent counsel can determine, with the actual practices this Court has followed. Such a practice would in any event create an unfortunate potential for "sandbagging" that should not be a part of the practice before this Court.

result, petitioner was deprived of any meaningful opportunity to respond to the serious allegations and arguments first raised on the Brief in Opposition.

b. The Office of the Clerk of this Court has a deserved reputation for accuracy, reliability, and unfailing fairness and courtesy to the parties and counsel who come before the Court. Based upon his occasional experiences over the years, counsel for petitioner fully shares that view. Indeed, had this problem occurred in a different case, counsel probably would have expressed his concerns to the Clerk and let the matters drop without requesting relief from the Court. But this is not an ordinary case, and counsel believes there are two reasons that create a special need for the Court to grant relief here.

First, the Brief in Opposition interjected factual questions into the case and directly challenged the integrity and

professional competence of counsel for petitioner. The Brief in Opposition alleged that counsel had tendered questions not "fairly raised by the record" and accused him of taking positions in the Petition inconsistent with those argued below. No member of the Bar of this Court could fail to reply to such charges if only to fulfill his or her professional duty to assure that the Court had before it that which was essential to enable the Court to resolve factual issues such as those first interjected by the Brief in Opposition. The accompanying Motion and Reply were prepared to achieve that end in this case. Under the rules and normal practice, both would have been before the Court before it acted. Counsel believes that the Court should have had the opportunity to consider them before it acted upon the Petition and submits this Petition for Rehearing so that the Court may exercise that option now. Fundamental fairness to peti-

tioner as well as a proper concern to assure the rules and procedures of this Court are observed thus combine to suggest that rehearing must be granted here.

Second, the premature action in this case has enhanced questions that needed no enhancement. This is a case that has pitted federal judges against a federal judge before federal courts presided over by specially selected and designated judges and that has required those courts to balance the interests of an individual judge against the desires of judges high in the judicial bureaucracy in order to resolve a dispute over the means appropriate to achieve an agreed end: preserving the integrity and independence of the federal courts. Throughout, the concerns over the ability of the presiding judges to maintain the necessary

appearance of impartiality have been real and apparent.

Against that background, this Court should not permit the Petition to be denied in a manner that suggests that a petitioner federal judge, who sought relief from actions that his more senior judicial colleagues initiated, was not accorded the same opportunities to be heard and have his views considered that this Court routinely accords other litigants who petition it for relief.

CONCLUSION

Petitioner respectfully submits that this Court should grant this Petition for Rehearing and vacate the order denying the Petition for Writ of Certiorari in order that it may consider and act upon the Motion and

then consider the Petition with a proper record before it.

Respectfully submitted

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Honorable Alcee L. Hastings,
petitioner.

CERTIFICATE OF COUNSEL

Pursuant to Rule 51.2 of the Rules of the Supreme Court of the United States, the undersigned certifies that:

1. He is a member of the Bar of this Court and is counsel of record for petitioner, the Honorable Alcee L. Hastings;

2. The foregoing Petition for Rehearing is based upon and restricted to substantial grounds not previously presented to the Court that counsel did not know and could not properly have known until October 9, 1984; and

3. The foregoing Petition for Rehearing is submitted in good faith and not for delay.

Terence J. Anderson